COMMENT AND RESPONSE ON December 2006 IOP FSEIS

The comment period began with the publication of the Notice of Availability in the Federal Register on December 22, 2006. Comments on the report were received from the following agencies and individuals:

U.S. Environmental Protection Agency (EPA), Region IV

Miccosukee Tribe of Indians of Florida (Dexter Lehtinen, incorporating all previous Tribe comments on IOP)
South Florida Water Management District (SFWMD) (Non-Federal sponsor)

State of Florida, State Clearinghouse, Department of Environmental Protection (Consistent with CZM Program)
State of Florida, Department of Agriculture and Consumer Services
State of Florida, Fish and Wildlife Conservation Commission (FWCC)
State of Florida, Department of Environmental Protection (FDEP)
State of Florida, Department of Transportation (FDOT)
State of Florida, Department of State, State Historic Preservation Officer (no comments)

Miami-Dade Department of Environmental Resources Management

In the following comment/response section, Comments received are reproduced as scans in Adobe Acrobat format. The principal comments of each reviewer are highlighted in gray on the scanned letters, with comments numbered sequentially. Responses follow by number in italic font.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

JAN 24 2007

District Engineer
Attn: Dr. Jon Moulding
Army Corps of Engineers
P.O. Box 4970
Jacksonville, FL 32232-0019

Subj: Final Supplementary Environmental Impact Statement (FSEIS) on the Interim Operational Plan (IOP) for Protection of the Cape Sable Seaside Sparrow

Dear Dr. Moulding:

Pursuant to Section 102(2) (C) of the National Environmental Policy Act (NEPA) and Section 309 of the Clean Air Act, the U.S. Environmental Protection Agency (EPA) has reviewed the subject U.S. Army Corps of Engineers (COE) Final Supplemental Environmental Impact Statement (Final SEIS) in which environmental impacts associated with water control/pumping/management strategies were described and identified as preferred Alternative 7R.

This alternative modified a previously-implemented Interim Operational Plan (IOP) designed to protect the Cape Sable Seaside Sparrow (CSSS), an endangered species living in and near Taylor Slough and in Big Cypress Swamp situated in southern Florida. Alternative 7R is the end product of a mediation process between the U.S. Fish and Wildlife Service, National Park Service, Corps of Engineers, and South Florida Water Management District (SFWMD). EPA's letter of August 18, 2006, supported implementation of this **IOP** as the best practicable solution to the CSSS issue and requested that additional information be provided in the Final SEES. **EPA-1**

Supplemental water quality data requested by EPA was provided in the Final EIS Appendix G. In addition, COE indicated that all operations impacting water quality associated with the IOP will be consistent with Clean Water Act Section 401, and that certification will be provided to the State of Florida by either COE or SFWMD. EPA appreciates this additional information. **EPA-2**

EPA reiterates that it would be beneficial to document any trade-offs against the loss of 3.4 FU of wetlands and a 5 to 10% loss of aquatic connectivity; and that operational procedures should maximize the delivery of cleaner water to ENP and minimizes the influence of seepage water from urban/agricultural areas. **EPA-3**

Thank you for the opportunity to comment on this action and/or related water delivery projects. Veronica Fasselt (561) 616-8867 will serve as initial points of contact for water quality issues; for NEPA-related concerns, please contact John Hamilton (404) 562-9617.

Sincerely,

Heinz J. Mueller, Chief
Office of Environmental Assessment

Responses:

EPA-1. Thank you for supporting Alt 7R. EPA rated the DSEIS as EC-2, indicating support for the IOP plan (Alt 7R) and requesting additional water quality information. All EPA questions were answered in the FSEIS (See Appendix I: Comment and Response). Supplemental water quality data was provided in the Final SEIS as noted.

EPA-2. No response required.

EPA-3. The Corps agrees that operations should maximize delivery of cleaner water. Trend analysis indicated that water in lower L-31 borrow canal is cleaner than it was in the 1980s and 1990s. Regarding wetlands loss and explicit mitigation, the few acres or functional units lost under the footprint of the C-111 levees have been more than compensated for by the rehydration of a much greater area of adjacent lands in eastern Everglades National Park and Taylor Slough. Eastern ENP lands were acquired for the Park in the 1990s. The operation of the C-111, Alt 7R, impoundments have aided in their rehydration through return pumping and impoundment of seepage water. The impoundments create a hydraulic ridge to slow seepage loss of groundwater from the easternmost Park lands. The seepage wells installed in the Park near the impoundments in mid-2006 will allow us to optimize water management in the impoundments during subsequent wet seasons and assure that project benefits are realized.

LEHTINEN VARGAS & RIEDI

ATTORNEYS AT LAW
A PROFESSIONAL ASSOCIATION

February 5, 2006

Colonel Paul L. Grosskruger
c/o Jon Moulding
United States Army Corps of Engineers
701 San Marco Blvd.
The Prudential Building
Jacksonville, Florida 32207-8175
Via Fax **and** U.S. **Mail; E-Mail; and Express Mail**

Re: OBJECTIONS BY MICCOSUKEE TRIBE OF INDIANS TO THE DECEMBER 2006, SO-CALLED FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ("FSEIS") ON THE INTERIM OPERATIONAL PLAN ("IOP")

Attention: Dr. John Moulding at iopcomments@saj02.usace.army.mil

"The Everglades is Our Mother and she is dying." - Chairman Billy Cypress

Dear Colonel Grosskruger,

I. EXECUTIVE SUMMARY

The Corps and FWS Actions Are Destroying the Tribal Everglades in WCA 3A and Threatening the Continued Existence of the Endangered Snail Kite

The Army Corps of Engineers (Corps) Final Supplemental Environmental Impact Statement (FSEIS) on the Interim Operational Plan (IOP), even while legally inadequate, contains proof that the "experiment in the field" that the Corps and the Fish and Wildlife Service ("FWS") have conducted in the Everglades for the past nine years has destroyed vast areas of the Tribe's Everglades homeland and is threatening the continued existence of the endangered Snail Kite. Despite being forced by a Federal Judge to conduct an SEIS, the Corps continues to refuse to conduct the environmental analysis required by law, including the mandatory cumulative impacts analysis of IOP when added to other actions. This failure has likely caused the Corps to even underestimate the harm it is causing to vast areas of the Everglades that it has been charged by Congress to restore under the Comprehensive Everglades Restoration Plan "CERP." **MIT-1**

Rather than restore the Everglades, the FSEIS contains damaging proof that the Corps' past nine years of draconian water management actions and FWS misguided policies has moved the ecosystem further away from restoration and has devastated the habitat in WCA 3A. Most important, it shows that there will be little Everglades left to restore if the current unlawful, and unexamined, path continues.**MIT-2.**

MIT-1 Response: The Corps has examined the cumulative impact of operating under IOP, in the "Cumulative Impacts" paragraphs on pp 86-87. IOP's interactions with Mod Waters, the Canal-111 and other projects are shown in Table 4-1. The FSEIS discusses the effect of operations of IOP on WCA-3A, and thus the snail kite, beginning on FSEIS p. 53. Direct effects on the snail kite and its habitat are discussed beginning on p.76. To cite the FSEIS from page 76:

> ***From about 1993 to present, which coincides with Test 7 of the Experimental Program and subsequent ISOP and IOP operations, WCA-3A stages have shown relatively little annual variation compared to the previous decades, with an annual average stage of about 9.5 ft (2.9 m). In addition, stages in WCA-3A have exceeded 10.5 ft (3.2 m) in 10 of the past 13 years, while there were only about 4 occurrences of stages exceeding 10.5 ft (3.2 m) during the 40-year period from 1953 to 1993. Stages in 1994, 1995, and 1999 also exceeded 11.5 ft (3.5 m), and are the three highest stages within the period of record (USFWS 2006).***

This information is graphically illustrated in Figure 1. The FSEIS further acknowledges on page 79:

> ***Snail kites have increasingly moved their nesting activity to areas of higher elevations in WCA-3A over the past two decades***

These citations clearly tie higher water levels in WCA-3A to pre- ISOP and pre-IOP operations, and indicate that shifts in kite nesting activities has occurred over the last two decades . The high water conditions in WCA-3 are the combined result of the of levees constructed to create a reservoir in accordance with the original project purposes, the amount of rainfall over the conservations areas themselves and inflows to the conservation areas. As stated in the C&SF Project authorizing document (House Document 643, May 6, 1948, page 42) the purposes of the conservation areas are:

> ***Everglades Conservation Area. (1) The plan would create three interconnected reservoir areas totaling about 1,500 square miles which would occupy portions of Dade, Broward and Palm Beach Counties. These reservoirs would store the maximum-record rainfall on the conservation area plus the run-offs from the area north of West Palm Beach Canal, the Everglades Agricultural Area, and some flood discharge from Lake Okeechobee. Impoundment of these waters would prevent their flowing eastward and flooding the developed areas along the coastal ridge.***

As such, the project features were specifically designed to "impound" water in the conservation areas to serve the multiple purposes of preventing overflow of flood waters from the Everglades to coastal areas, conservation of water for municipal and agricultural use, prevention of salt water intrusion and the preservation of fish and wildlife.

Figure 1 illustrates the actual observed water levels in WCA-3A from available recorded water level data. The graph depicts the 3-station average water levels observed at Sites 63, 64 and 65 and the water levels observed at the southern most gage in WCA-3, Site 65. The colored bar across the top of the graph denotes the various operational regimes over time. The observed historical water level data shows that the three highest stages recorded in WCA-3 occurred in the 1994-1995, and 1999 wet season during the period of operations associated with Test 7 of the Experimental Program. As depicted in Figure 2, the third highest water level in WCA-3 was associated with Hurricane Irene which passed over the area October 14-16, 1999. The operations associated with Test 7 of the experimental program officially terminated in January, 2000. Transition to ISOP operations occurred in December 1999. Water levels in WCA-3 had reached 12.62 feet by October 31, 1999 under Test 7 operations and peaked on November 3, 1999 at 12.69 feet prior to the transition to ISOP operations. Therefore, two of the three highest recorded water levels in WCA-3 occurred prior to any closures of the S-12s to protect the sparrow and the third highest water level in WCA-3A had reached 12.62 feet prior to transition of operations to ISOP, after which time the water level increased by an additional 0.07 feet. The observed water level data reflect the sensitivity of the water management system to rainfall and climatic events. There is considerable evidence that a large scale shift in climate patterns may be partially responsible for higher stages in WCA-3A during the past 15 years.

The situation in WCA-3A, of temporary adverse impacts due to closure of the S-12 gates and lack of connectivity between WCA-3A and 3B, is offset to the extent possible by releasing water from S-333 to avoid harmfully high water (FSEIS p. 54 et seq.). Model runs for Alt 7R only showed about a 1% increase in high stages in WCA-3A, compared to previous alternatives. The problem will further be alleviated when the MWD project Conveyance Structures through L--67A and C levees are constructed and operational under CSOP, the successor operational plan to IOP. The ultimate solution to reducing the high water conditions in WCA-3A resulting from the C&SF Project are planned as part of CERP. The IOP is an "interim" operational plan for protection of the CSSS and cannot achieve the goals of the CERP plan without the major structural modifications associated with CERP in place.

Cumulative impacts were analyzed in the IOP EIS and SEIS. The 1995 Base Condition (95MB4), representing operations in 1995 under Test 7, was modeled. Also modeled was existing conditions at the time IOP was under development (ALT1CUR). ALT1CUR included physical and operational changes in the system that had occurred after 1995 that were not represented in the 1995 Base model run (95BM4): WSE operations for Lake Okeechobee, Stormwater Treatment Areas, and ISOP operations. The modeling for IOP showed the cumulative impact of those actions and then compared those conditions to the IOP alternatives.

Modeling results showed the high and low water stages and durations in WCA-3A changed appreciably between the 95BM4 and ALT1CUR. For example, the "Number of Weeks High/Low Depth Criteria Exceeded" performance measure for Indicator Region 14 changed from 494 weeks (over 31 years) to 563 weeks. The difference in high water levels between ALT1CUR and the selected plan for IOP (ALT7R) was 3 additional weeks (from 563 to 566 weeks).

In comparing the IOP selected plan to the existing conditions, final modeling showed less additional weeks of high water levels than FWS had anticipated in their biological opinion. Only once, over the modeled period of record, did ALT7R go higher in IR 14 than ALT1CUR (by about 0.2 ft); the rest of the time, the predicted performance was the same.

MIT-2 Response Refer to Response 1, above. Effects are documented in the EIS, pp.75-80, and in the engineering appendices to the FSEIS. Adverse effects on WCA-3 habitat are also discussed in the "snail kite" sections of the BO, reproduced in App. F (ESA Coordination Documents). The FSEIS acknowledges the snail kites have increasingly moved their nesting activity to areas of higher elevations in WCA-3A over the past two decades, presumably as the traditional nesting vegetation has been affected by sustained high water levels (FSEIS pg 79). Since the implementation of IOP in 2002 the South Florida area has seen 3 of the 5 years directly impacted by hurricanes (in 2004 Hurricanes Charley, Frances and Jeanne and Ivan (as a tropical wave); in 2005 Hurricanes Katrina and Wilma; and in 2006 Hurricane Ernesto). However before the implementation of IOP the 1990's produced higher peak stages in WCA-3A by more than 0.75 feet, peak stages at Site 65 for years 1994-12.04ft NGVD, 1995-11.87ft,1999-11.9 and during IOP 2003-11.04ft, 2004-11.04ft, and 2005-11.15ft. However, the Corps has always attempted to balance the closure of the S-12 structures (prior to/during the CSSS nesting season) with water releases from other structures (S-151 and S-333) to equal the WCA-3A water control plan as it would be if the S-12's were open. When climatic extremes cause high water levels in WCA-3a and 3B (as in 2003, 2004, and 2005) water management operations cannot avoid high stages.

Continuing along this misguided path for another four years or more will lead to the continued decline, and perhaps even extinction, of the endangered Everglade Snail Kite that has declined 50% during the years of ISOP and IOP. The Miccosukee Tribe, whose members have long called the Everglades home, strenuously objects to the IOP FSEIS and contends that it does not comply with the National Environmental Policy Act ("NEPA") and other federal law, nor the Court's March 24, 2006, Order.1 Based on comments from the Tribe, the FSEIS finally divulges that Judge Moore's Order in Case No. 00-22778-Civ-Moore was the result of a case brought by the Miccosukee Tribe in which the Court found that the Corps violated NEPA and attaches the Court Order, it still fails to disclose the findings in the text of the document. For instance, the Order states: "The Court agrees with Intervenors and Plaintiff [Tribe] that the failure of the Corps to prepare a SEIS, with hydrologic modeling results... was arbitrary and capricious. Accordingly, for the reason stated above this Court finds that Defendants Corps violated NEPA." Order at 13. It further found, "It is clear to this Court that the Corps violated NEPA by failing to issue an SEIS after adopting Alternative 7R," and ordered the Corps to issue an SEIS on IOP." Order at 32-33.**MIT-3**

MIT-3 Response: With regard to the snail kite, see the July 7, 2006 Biological Opinion in which the U.S. Fish and Wildlife Service concludes IOP is not anticipated to reduce the likelihood of survival and recovery of the snail kite, With regard to NEPA, the Corps has supplemented its EIS in accordance with the Court's order and provided a discussion of modeling output for Alt 7R and described in detail the constructed C-111 and MWD project elements and their purposes. We further note that the main difference between Alt 7R and the previous, tentatively selected plan, Alt 7, was not a drastic change in operations, but rather the addition of more water detention and seepage control capabilities along the eastern Everglades

National Park boundary as described in the FSEIS; this addition, while benefiting ENP, also helped to alleviate concerns of residents and agricultural interests in South Dade County related to flooding potential under Alt 7.

Incredibly, despite the Court's Order to conduct an SEIS on IOP, a review of the FSEIS shows that the Corps did not do so. The document states that: "Evaluation in this document is limited to the Recommended Alternative 7R and the effects of the recommended plan to date." FSEIS at 23. Thus, the Corps failed to conduct the alternatives analysis, which is the heart of an EIS, using the updated version 4.4 of the SFWMM Model to conduct a comparison of the environmental impacts of the alternatives to 7R.**MIT-4.** Unbelievably, the SEIS states that the "alternatives were previously compared in section 4.0, Environmental Consequences, of the 2002 Final FEIS." Id. This is the same analysis which the Corps found was not based on the correct modeling. Thus, the Corps' FSEIS is not really and SEIS, as required under NEPA. This is disturbing in light of the fact that the FSEIS contains proof that the Corps' failure to follow the requirements of NEPA, the ESA and other federal law for the last nine years has resulted in a dire situation on Tribal Everglades in Water Conservation Area 3A ("WCA 3A"), which is also the critical habitat for the endangered Snail Kite. The FSEIS confirms that WCA 3A, the vast area of the Everglades that the government promised would be preserved in its natural state "in perpetuity" for the Tribe, has severely deteriorated during the last four years of IOP operations. "The principal concern is that the habitat quality, and thus the carrying capacity of, WCA 3A is already seriously degraded." FSEIS at 79. "Habitat quality in WCA 3A is changing progressively and dramatically to less desirable habitat in this area, and this conversion is rapid, with changes even after a year." Id. There is also extremely bad news for the endangered Snail Kite. "The snail kite population in Florida progressively and dramatically decreased between 1999 and 2002." Id. at 78. "Since 2002, kite production in WCA 3A has dramatically dropped, having produced no kites in 2005." Id. at 77-78.**MIT-5.**

MIT-4 Response: This Supplemental EIS supplements the alternatives analysis in the original FEIS of 2002. In compliance with the 2006 Order of Judge Moore we have discussed modeling results and provided details regarding the C-111 structures and their purposes and the S-356 pump and its purpose. NEPA implementing regulations permit incorporation of previous material by reference.

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[1]The Tribe incorporates its comments on the Draft SEIS dated June 2006, Final Supplemental EIS and Draft SEIS dated November 26, 2001, the Draft EIS dated April 9, 2001, along with the comments attached to those filings on the Interim and Structural Operation Plan (ISOP), and the public comments made at the January 11, 2000 public meeting, the May 21, 2002 meeting and all other public meetings concerning the IOP, including the May 21, 2002 meeting.

The basic model version used for IOP modeling was SFWMM v4.4. This version of the model had a period of record run from January, 1965, to December, 1995. During the course of the modeling, v4.4 additions were made to include specific operations under consideration such as: Dual operations for passing water to SDCS; S-356 operation; and C-1ll reservoir operations. The inclusion of these operations did not change the basic model version, but added options for those operations. The modeling results of the alternatives were comparable within the same basic version of the SFWMM.

The SEIS was based on the modeling not previously reported in the IOP EIS. The discussions of modeling results were all based on v4.4.

Some of the performance graphics did not printout the correct model version because they were developed under previous versions with graphic labels that could not be easily changed. For example, the Number of Weeks High/Low Depth Criteria Exceeded performance measure (for IR 14), the printed version was displayed as "SFWMM V3.4" even though it was generated from SFWMM 4.4. Technically, the reason some graphics showed v4.4 and others showed v3.4 is because some graphic programs were written to check for versioning to print on the graphic; other programs were compiled such that the model version label on graphic was "hardwired" and did not include the code that checks for model versioning to print on the graphic.

MIT-5 Response: The FSEIS at page 79 notes that snail kites have increasingly moved their nesting activity to areas of higher elevations in WCA-3A over the past two decades. The FWS BO further notes that two of the three highest stages within the period of record occurred in 1994 and 1995, which were prior to any emergency deviations for the CSSS, the ISOP or IOP operations (FWS BO pg 68). The FSEIS discussion continues and concludes that continued monitoring of kites and habitat is needed to separate the effects of unusually wet hurricane years, such as 1995, 1999, 2004 and 2005, from effects due to human management of WCA 3A stages. The 2006 FWS Biological Opinion states an expectation of adverse effects of IOP on the WCA-3A snail kite habitat for the four more years estimated that the system will have to operate under IOP. There are specifications regarding water recession rates and monitoring of snail kite population and habitat associated with FWS' findings and requirements. The Corps will comply with FWS requirements for monitoring at specified gauges.

The FSEIS finally details some of the devastation that has occurred in WCA 3A, but the true extent of the damage remains unknown since the mandatory cumulative impact analysis has not been conducted. The FSEIS also fails to contain any analysis of the environmental impacts of other alternatives against Alternative 7R and contains no analysis of reasonable alternatives to the operating plan that is devastating Tribal Everglades and the endangered Snail Kite and its critical habitat. Even after detailing the damage that has occurred under IOP, the FSEIS comes to the arbitrary and capricious conclusion, contrary to the facts in the document, that: "it [Alternative 7R] could adversely affect snail kites and designated critical habitat in WCA 3A but would not likely jeopardize the species. FSEIS at 76.**MIT-6.** This statement is directly contrary to the warning of Dr. Wiley Kitchens that "this trend of lowered reproduction is a cause of

concern regarding the sustainability of the [Snail Kite] population." Id. at 78. This warning to the Corps that extinction is imminent was ignored along with the 2003, 2004 and 2005 Snail Kite Demography Annual Reports that were paid for by the Corps but not included in its references in the FSEIS. The Tribe has attached the 2005, 2004, and 2003 Reports as Attachments A-1, A-2 and A-3 respectively. They contain the recommendations and warnings which the Corps and the FWS chose to ignore. For example, the Corps did not divulge, the warning in the 2005 Report that the Snail Kite researchers are very concerned about the alarmingly high water levels that have existed in WCA 3A. Id. at 19. The Tribe will pursue violations of the ESA, including Section 9 takings, against both the Corps and Fish and Wildlife Service ("FWS") for this irresponsible neglect of the decline of the Snail Kite and the degradation of its critical habitat.

MIT-6 Response: This is a paraphrase of the FWS BO, Page 70. "However, because snail kites regularly and successfully breed in other parts of their range and because they are long-lived and have high adult survival rates under normal (non-drought) conditions, localized detrimental conditions, even when they occur when kite population sizes are at a reduced level, do not pose a significant risk to the persistence of the species over the next 4 years." Regarding other alternatives, the Service also noted that ISOP effects on WCA-3A were "similar to those of IOP." This Supplemental EIS supplements the alternatives analysis in the original FEIS of 2002. In compliance with the 2006 Order of Judge Moore we have discussed modeling results and provided details regarding the C-111 structures and their purposes and the S-356 pump and its purpose. NEPA implementing regulations permit incorporation of previous material by reference.

A review of the FSEIS shows that the Corps is still failing to comply with the National Environmental Policy Act ("NEPA"), the Administrative Procedures Act ("APA"), the Endangered Species Act (ESA), along with implementing regulations.**MIT-7.** Moreover, the Corps has not complied with the Corps' Trust responsibility to the Tribe (including their responsibility to protect the Tribe's reservation and leased lands in WCA-3A), and the U.S. Constitution. A review of this perfunctory document shows that it was hastily put together and that the conclusions are not supported by the facts.

MIT-7 Response: The Corps has complied with the Court's order, and according to EPA, with NEPA. In its March 13th, 2006 Order, the Court concluded the Corps had not improperly delegated authority in violation of the APA, and IOP was not subject to APA rulemaking. The Court also concluded the Corps had not violated the ESA; nevertheless, the Corps re-initiated consultation under Section 7 of the ESA in conjunction with the SEIS. The Corps, in cooperation with FWS, continues monitoring of endangered species and habitat in the IOP action area.

After the Tribe's comments on the DSEIS, the FSEIS now contains the modeling results for Alternative 7R for WCA 3A using version 3.4 of the SFWMM model, but does not contain them for other Alternatives or other parts of the Everglades. The modeling results for WCA 3A prove what the Tribe has been saying for years concerning the high water impacts on WCA 3A. The hydrograph for WCA 3A, which is included is the same on the Tribe has been using for years, and proves that the Tribe was correct that the Alternative 7R modeling results that existed

in 2002 show that there are many more weeks of sustained high water in indicator region 14 that is monitored for the Snail Kite, when compared to Test 7 and ISOP. The FSEIS, however, does not appear to contain modeling results with the most current SFWMM model for Alternative 7R, nor modeling results for the other alternatives using the current model. The FSEIS also continues to fail to contain any modeling results for other areas of the Everglades impacted by IOP, including Lake Okeechobee and the estuaries. The FSEIS is required to be a full disclosure document, and failure to include the modeling for these other areas violates NEPA.**MIT-8.**

MIT-8 Response: See response to MIT-4 regarding model version used throughout IOP analyses. Results of the modeling for other areas were discussed in this supplement. The graphics and figures associated with the model output were posted, and are still available, on the website. The IOP website showed all the normal indicator regions all the alternatives throughout the entire C&SF region.

As noted in response to MIT-1, the high and low water stages and durations in WCA-3A changed appreciably between the 1995 Base (95BM4) and the current conditions alternative (ALT1CUR) for IOP. For example, the "Number of Weeks High/Low Depth Criteria Exceeded" performance measure for IR 14 changed from 494 weeks (over 31 years) to 563 weeks.

Cumulative impacts were analyzed in the IOP EIS and SEIS. The 1995 Base Condition (95MB4), representing operations in 1995 under Test 7, was modeled. Also modeled was existing conditions at the time IOP was under development (ALT1CUR). ALT1CUR included physical and operational changes in the system that had occurred after 1995 that were not represented in 95BM4: WSE operations for Lake Okeechobee, stormwater treatment areas, and ISOP operations. The modeling for the IOP EIS showed the cumulative impact of those actions and then compared those conditions to IOP alternatives. The IOP website (http://hpm.saj.usace.army.mil***) showed all the normal indicator regions for all the alternatives throughout the entire C&SF region.***

It is not possible to return to Test 7 as those operations were terminated under the 1999 Biological Opinion for the Cape Sable Seaside Sparrow, and an Interim Structural and Operational Plan (ISOP 2000, 2001) was substituted. According to the Department of Interior, the year-round lower canal levels in the south Dade canal system associated with the ISOP adversely impacted wetlands near L-31N. This led to a collaborative, mediated process that developed IOP. Regarding other areas of C&SF, all model runs for all indicator regions were posted (and are still posted) on the website (http://hpm.saj.usace.army.mil***) for anyone to review. In fact differences between alternatives were so minimal north of WCA-3A that detailed review was not warranted.***

The Court also mandated that the Corps analyze the new structural components of IOP Alternative 7R as a result of the Tribe's lawsuit. The Court was concerned that the Corps did not analyze the impacts of the addition of the "R" structures. As the Court stated, "[t]he changes implemented by the Corps could hardly be considered insignificant" and found that the "actual structures are different" than any structures analyzed in previous EIS. Order at 12. The FSEIS

continues to contain misleading, and incorrect statements about these temporary IOP components, which are not the same as the permanent structures that will be built as part of the C-111 and Modified Water Deliveries Projects. After the Tribe's comments that the temporary S-356-like pump was NOT constructed in the exact location specified by the Mod Waters 1992 GDM, the FSEIS now says it was built "approximately at the location." FSEIS at 22. While correcting some incorrect statements, the FSEIS now contains others. For instance, the Tribe is not part of any S-356 Team, as the FSEIS claims. Id. at 19. Nor did the Tribe claim that no Alternative 7R model runs were available when the 2002 IOP FEB was completed but claimed just the opposite, that preliminary model runs did exist but were not used by the Corps to analyze the impact of Alternative 7R and other alternatives. Id. at 5.**MIT-9.**

MIT-9 Response: The structures were constructed as interim facilities (S-332B and S-332C) as part of the C-111 project and included in operations for protection of the CSSS to utilize the additional capacity to remove water from the canals in periods of excess water within the basin. It is planned that the permanent capacity of these facilities would be determined as part of the CSOP Study. The S-356 was constructed as part of the MWD project, its capacity was reduced from the 1992 GDM due to the design for the 8.5 SMA. With the S-357 pump station discharging south into the C-111 project the capacity of the S-356 pump station was reduced. The structures are functionally identical and will be replaced by permanent structures with the same capacity.

Although an early modeling of ALT7R existed in May of 2002, the modeling effort was considered too premature to be relied upon for the 2002 EIS. The coordinated and approved model run for ALT7R, with all needed updates, was not completed until October of 2002. It was available to the public on the website in November, 2002. The Record of Decision was signed prior to that date and is the date of approval.

It has now been nine years since the Corps began closing the S-12 gates and backing up water on Tribal Everglades in. WCA 3A. The Tribe warned that these actions would be devastating for the Everglades and the Snail Kite, but the Corps, who never conducted the before-the-fact analysis required by both NEPA and the ESA, ignored these warnings. Sadly, pages 75-80 of the FSEIS contains evidence that Tribe's warnings have become reality. Yet, despite the alarming decline of the vegetation in WCA 3A and the Snail Kite population, the Corps' FESIS continues to ignore, and not report, the warnings and recommendations of the scientists. Instead, the Corps concludes without proper analysis under NEPA and the ESA that IOP 7R operations should continue.**MIT-10.** The Corps continues to make bizarre claims, which can only be made by comparing IOP 7R to itself, such as that Alternative 7R predicted no significant increase over existing conditions in WCA 3A. FSEIS at 54. A look at indicator region 14, shows that there is a significant increase in the number of weeks that stages exceed 2.5 feet under IOP as opposed to 95 base and even to ISOP. One need only review the description of the downward spiral in WCA 3A at page 79 of the FSEIS for proof that this statement is incorrect.

MIT-10 Response: The Corps is in compliance with ESA Section 7 and with the National Environmental Policy Act. The FWS supports IOP (Alternative 7R) as does EPA.

The record gathered over the last four years of IOP operations openly contradicts these unfounded statements and shows that the Corps has acted in an arbitrary and capricious manner, and contrary to law, in conducting its FSEIS. There is absolutely no support in the document for the unfounded statement that Alternative 7R would not cause excessive ponding in WCA 3A. FSEIS at 65. Data shows it has done just that! Id. at 80. While the document admits that high water elevations during IOP and pre-IOP have resulted in some damage to tree island vegetation, it claims "it is likely" this would have happened under other alternatives without conducting the mandatory analysis of the environmental impacts of the alternatives. Id. Additionally, while the Corps admits that the preliminary data from vegetation monitoring within southern WCA 3A suggests that the vegetation community continues to change from *Eleocharis* wet prairie communities to open water slough, it fails to list these reports as references. Id. The FSEIS also fails to mention that apple snail production has decreased 82% in southern WCA 3A in 2005. Most telling, the FSEIS also fails to contain, or analyze, the FWS prediction that continued operation of IOP Alternative 7 R will result in the degradation of 184,320 acres of Snail Kite critical habitat in WCA 3A for each of the next four years. The Corps was required to analyze this information on the degradation of 184,320 acres in WCA 3A per year combined with the 88,300 acres of Snail Kite critical habitat that FWS previously predicted would be degraded by IOP, but failed to do so. This is especially disconcerting in light of the 50% decline in the Snail Kite population, and the degradation of critical habitat described at pages 75-80 of the FSEIS. It is clear that both the Corps and FWS findings that Alternative 7R would not result in the destruction or adverse modification of Snail Kite critical habitat or harm the Snail Kite is incorrect.[2] The data in the 2003, 2004, and 2005 Snail Kite Demography Annual Reports, and the Corps FSEIS, shows that IOP has done just that. Id. at 75-80; Attachments A-1, A-2, A-3.**MIT-11.**

MIT-11 Response: The Corps developed the IOP Plan in cooperation with a collaborative interagency group sanctioned by the Council on Environmental Quality after receiving a "Jeopardy" opinion on the CSSS, in 1999. Alt 7R operations allowed the Corps to achieve conditions equivalent to the RPA requirements of this BO, as amended in 2002. The FWS determined, in the 2006 BO, that no jeopardy to the snail kite, as a species, would result from IOP operations. FWS is the stewardship agency for both the CSSS and the snail kite. The Corps reasonably relies on FWS Biological Opinions.

In short, the FSEIS contains errors, inaccurate statements, misrepresentation of facts and a failure to report the alarming nature of the data. A review of this perfunctory document, shows that the Corps has treated the IOP FSEIS ordered by the Court as yet another case of "first the verdict-then the trial," and has failed to meet the requirements of NEPA and other federal law.

[2] The Miccosukee Tribe has sued the FWS for violations of the ESA related to its November 17, 2006 Biological Opinion, alleging failure to conduct adequate consultation on the IOP SEIS and challenging issuance of an Incidental Take Statement for the Snail Kite in Case No. 05-23045-Civ-Moore.

Alternative 7R, which was devised and adopted "behind closed doors" has once again been rubber stamped without even returning to the group that allegedly endorsed it to get their opinion

on the new modeling and the harm it has caused. FSEIS at 20. It is clear that the Corps regarded the FSEIS as merely a paperwork exercise designed to feign compliance with the Court's Order. The agency's failure to follow NEPA and other federal law has caused it to implement a IOP 7R that has caused the rapid and progressive degradation of Tribal Everglades in WCA 3A; degraded the Snail Kite's critical habitat, and caused a 50% decline in its population, and that has caused, and will continue to cause, irreparable harm the entire culture and way of life of the Miccosukee Tribe of Indians. Id. at 75-80. **MIT-12**

MIT-12 Response: The Corps disagrees with the Tribe's allegations. With regard to the IOP process, please see response to MIT-11. The Corps complied with NEPA and the Court order for supplemental NEPA analysis. See response to MIT-3 and other responses relating to NEPA. Concerning the snail kite, please see response to MIT-1.

II. SPECIFIC COMMENTS ON THE WOEFULLY INADQEUATE FSEIS

A. THE FWS BIOLOGICAL OPINION THAT IT RELIES ON IS FLAWED

The FSEIS on IOP is faulty and in turn is based on the flawed 1999, 2002 and 2006 Biological Opinions of the Fish and Wildlife Service ("FWS"). The Tribe has long argued that the Corps was required to reinitiate consultation with FWS on the updated modeling that showed many more weeks of sustained high water under IOP Alternative 7R in Snail Kite critical habitat **MIT-13.**

in WCA 3A, but the agency failed to do so until the Court ordered this SEIS. The Corps refused to do so even after the 2003 Snail Kite Report showed an alarming 50% decline in the Snail Kite population. Contrary to the Corps assertion in the FSEIS, modeling results of Alternative 7R using the newer version of the SFWMM model was available during the 2002 IOP EIS process. FSEIS at 5. The continued alarming decline of the Snail Kite documented at page 77-79 of the FSEIS (and in the 2003, 2004, and 2005 Snail Kite Reports) is proof that the FWS 2002 Biological Opinion was incorrect when it predicted that the degradation of 88,300 acres of Snail Kite critical habitat in WCA 3A would not harm the Snail Kite. The FWS prediction in its 2006 Biological Opinion that degradation of 184,320 acres per year there for the next four years will not cause further harm is also incorrect and not based on the best science available. Nowhere is the text of the FSEIS does the Corps even discuss, let alone analyze, the predicted 184,320 acres per year of degradation. The Corps can not merely attach the FWS' faulty Biological Opinion to the FSEIS without conducting its own analysis. The FWS flawed Biological Opinions can not be the basis for the proposed IOP Alternative 7R action. Instead, the Corps must use the information available to it in the form of the 2003, 2004, 2005 Snail Kite Reports, and any other reports that exist, to analyze the impacts on endangered species but has failed to do so. The Corps can not rely on FWS's selective use of science and/or their inadequate Incidental Take Statement, to declare compliance with the ESA.

The FSEIS contains evidence that the Corps' draconian water management actions,

allegedly taken in response to the demands of the FWS, has caused, and will continue to cause, irreversible destruction of Tribal Everglades in WCA 3A, and has adversely affected the Snail Kite and its critical habitat there. FSEIS at 75-80; Attachment A-1, A-2 and A-3. The document admits: "The principal concern is that the habitat quality, and thus the carrying capacity of, WCA 3A is already seriously degraded." FSEIS at 79. "Habitat quality in WCA 3A is changing progressively and dramatically to less desirable habitat in this area, and this conversion is rapid, with changes even after a year." Id. at 79. "The snail kite population in Florida progressively and dramatically decreased between 1999 and 2002." Id. at 77. "Since 2002, kite production in WCA 3A has dramatically dropped, having produced no kites in 2005." Id. Most alarming, Dr. Wiley Kitchens believes that "this trend of lowered reproduction is a cause of concern regarding the sustainability of the population." Id. The Tribe warned that modeling showed that IOP 7R would exacerbate the flooding in WCA-3A, but neither the Corps nor FWS cared about the Tribe's Everglades, nor the plight of the Snail Kite.

The Corps continues to refuse to take an independent hard look at either the Snail Kite or Sparrow science. It also refuses to analyze reasonable alternatives suggested by Sparrow experts such as captive rearing, predator control and other localized actions that would not result in massive changes to the water management system, threaten private and public property and cause irreversible destruction to other parts of the Everglades, including WCA-3A.**MIT-14.** See, Tribe's Comments on Draft EIS {April 9, 2001): Attachment 2, paper of Dr. Will Post and Dr. John Greenlaw. The FSEIS mentions but fails to analyze these reasonable alternatives. Despite the FSEIS admissions about the devastation to WCA 3A, and the alarming decline of the Snail Kite under IOP, the Corps continues to recommend Alternative 7R that will continue to cause the harm. Incredibly, the data shows that both ISOP and IOP have not helped Sparrow sub-population A. FSEIS at 71. Contrary to the FWS' predictions that closing the S-12 gates would cause it to "flourish," the western sub-population A has declined since 1999. Id. It fared better under Test 7 operations. Id. While the FSEIS parrots the FWS' unproven claim that closing of the S-12 gates helps the Sparrow, the population estimates show that this sub-population fared quite well with the gates open in 1981 and in 1992 until Hurricane Andrew hit. Id. In fact, the sub-population A estimates show that the Corps' actions under ISOP and IOP have actually caused sub-population A to decline, which would be in keeping with Dr. Post and Greenlaw's warnings that the actions being taken are "simplistic." Id. Indeed, the 2006 Biological Opinion now predicts a taking of the Sparrow under IOP, and admits that no increase in the population of A is expected under four more years of IOP. Id. at 73-74. The Corps FSEIS should also acknowledge the fact that water will be higher under CERP in this area than FWS is insisting it be kept now.**MIT-15.**

MIT-13 Response: Cumulative impacts were analyzed in the IOP EIS and SEIS. The 1995 Base Condition (95MB4), representing operations in 1995 under Test 7, was modeled. Also modeled was existing conditions at the time IOP was under development (ALT1CUR). ALT1CUR included physical and operational changes in the system that had occurred after 1995 that were not represented in the 1995 Base model run (95BM4): WSE operations for Lake Okeechobee, Stormwater Treatment Areas, and ISOP operations. The modeling for IOP showed the cumulative impact of those actions and then compared those conditions to the IOP alternatives.

Modeling results showed the high and low water stages and durations in WCA-3A changed appreciably between the 95BM4 and ALT1CUR. For example, the "Number of Weeks High/Low Depth Criteria Exceeded" performance measure for Indicator Region 14 changed from 494 weeks (over 31 years) to 563 weeks. The difference in high water levels between ALT1CUR and the selected plan for IOP (ALT7R) was 3 additional weeks (from 563 to 566 weeks).

Figure 3 graphically illustrates the number of weeks the actual observed 3-station average of water levels in WCA-3A and water levels at site 65 gage exceeded 10.5 feet from 1988 to present. After the very dry period from 1988 to 1991, many years have been above the 10.5 stage at Site 65. During the period from 1992 to 1999, when there were no S-12 spring closures for sparrow deviations to the Experimental Program, 7 out of the 8 years exceeded 10.5 ft. Closure of the S-12 in December of 1999 was the result of the high water created by Hurricane Irene, not spring closures of the S-12s. During the period from 2000 to 2006, when S-12 spring closures have occurred, 5 out of 7 years have had stages above 10.5 ft at Site 65. This information, combined with the MIT-1 response (about Figures 1 and 2), indicate that there is no apparent trend indicating the S-12 spring closures have induced higher stages in southern WCA-3A.

MIT-14 Response: We are unaware of any hard science that contradicts the FWS evaluation of Dr. Kitchens' results and those of other experts on sparrow or snail kite. The Corps does not maintain an independent expertise on advanced avian biology and reproduction, and we do not have reason to dispute the conclusions of the Fish and Wildlife Service.

MIT-15 Response: IOP is an "Interim operational plan for protection of the Cape Sable Seaside Sparrow", and is considered temporary in nature. All avian biologists active in South Florida are aware that CERP flows in ENP are generally planned to be higher than those under IOP.

B. MONITORING OF EVERGLADES DESTRUCTION V. NEPA ANALYSIS

The Corps knew long ago that the closing of the S-12s would cause the damage that is reported on page 75-80 of the FSEIS. On page 3 of appendix E to the February 5, 1999 letter from the Corps to Sam Hamilton of FWS, it states that actions requested such as limiting flow through the S-12s "may cause adverse environmental impacts in the WCAs as well as adverse impacts upon tribal interests." (emphasis added). FWS also stated at page 82, item 9 of the 1999 BO that: "Excessive water storage in WCA-3A, above the current operating schedule, adversely impacts the endangered Wood Stork, the endangered Snail Kite, and designated Snail Kite critical habitat." (emphasis added). In 2006, and only as a result of a Court Order, the Corps is finally partially reporting the devastating impact that closing these gates has had on WCA 3A and the endangered Snail Kite and its critical habitat. FSEIS at 75-80. The Corps, however, aware of the dire plight of the Snail Kite, does not analyze the changes to the regulation schedule that have been recommended by the scientists in the form of new alternatives. Unfortunately for

the Tribe and the Snail Kite, the continuing failure to comply with the law and analyze the cumulative impacts of the past, present, and future actions on the Snail Kite and its critical habitat in WCA 3A has had, and will continue to have, dire results.

For almost a decade now, the Corps has failed to follow NEPA, even when instructed to do so, by the Courts. To date, the Corps has yet to analyze the cumulative adverse impacts of their actions on the environment and other endangered and threatened species, as required by NEPA and the ESA. The Corps has also failed to reinitiate consultation on the Snail Kite, despite its alarming 50% decline in population under ISOP and IOP, until this SEIS was ordered by the Court. Even then, the consultation it was finally forced to enter into, was woefully inadequate. Most chilling, despite the alarming impacts to WCA 3A reported in the FSEIS, the Tribe believes that this is only the tip of the iceberg, because the Corps has never analyzed the cumulative impacts of past, present, and future actions (including the prior deviations, ISOP and IOP) on the human environment and endangered species. While the FSEIS attempts to remedy the deficiencies pointed out by the Tribe, it fails to do so. A mere listing of activities at Table 4.1 does not substitute for an analysis. FSEIS at 86-87, Section 4.19.**MIT-16.**

MIT 16 - Response: The Corps disagrees that these and similar conclusory statements fairly reflect the record. At the suggestion of the President's Council on Environmental Quality, the Corps engaged in an intense, prolonged, mediated collaborative process to develop the IOP. The Corps considered the No Action (Alternative 1), Alternatives 2 through 7 and finally Alternative 7R, all of which were incorporated by reference in this Final Supplemental EIS. The summary of the Corps evaluation of hydrologic modeling effects of these alternatives were also included in pages 43-55 of FSEIS. Other alternatives do not yield more acceptable results throughout the system, or for the sparrow. The IOP provides the best practical means to avoid and/or minimize adverse impacts while accommodating all the diverse interests to the extent it can be done within the capabilities of the existing water management system. The Corps is now working through development of CSOP alternatives, the next step in operations, intended for the period after the Mod Waters elements are complete and there is conveyance capacity across the L-67 levees and across Tamiami Trail.

For the past nine years, the Corps has chosen to evade the law, while the FWS used the sparrow to control the water to its liking without having to assess the damage inflicted on other endangered species and other parts of the Everglades. The Tribe has suffered much devastation from the Corps' water management actions. On February 13, 1998, the Chairman of the Miccosukee Tribe, Billy Cypress, declared an Emergency in WCA-3A. That emergency still exists. In fact, the FSEIS shows that WCA 3A has become so degraded that it may have reached its carrying capacity and be in danger of crashing. FSEIS at 79. Sadly, this is proof that the Tribe was right all along about the damage that the Corps' actions were causing to WCA-3A, the Snail Kite and the Tribe's lands, religion and culture and way of life. The Corps' failure to analyze other reasonable alternatives that would protect the Sparrow and the Snail Kite and WCA 3A, including re-evaluating the regulation schedule as recommended by the Snail Kite scientists, violates NEPA. The Corps' monitoring of the death of the Everglades in WCA 3A, and the alarming decline of the Snail Kite there, is contrary to NEPA, which requires an assessment of environmental impacts before the action is taken, not a an after-the -fact inventory of the

destruction caused by unanalyzed actions. **MIT - 17.**

MIT-17 Response: The Corps has not evaded the law but has complied with the terms of the 2002 amended biological opinion and indicated its intention to comply fully with the terms of the 2006 biological opinion. With regard to allegations concerning WCA-3A, please see MIT-1. The Corps has complied with the requirements of NEPA and the court order. See response to MIT-3 and other responses related to NEPA.

C. OTHER WAYS THAT THE INADEQUATE FSEIS VIOLATES NEPA

1. The NEPA Ruse and Blatant Rubber Stamping of Alternative 7R

The Tribe filed a lawsuit that claimed, among other things, that IOP 7R was constructed prior to the NEPA process being completed and without using the updated version of the SFWMM model which showed greater high water impacts. The Court ruled in favor of the Tribe finding that the Corps had violated NEPA and ordered the agency to conduct an SEIS. The Tribe expected the Corps to conduct a full NEPA analysis, not the abbreviated report on the impacts of only Alternative 7R that it conducted. While the FSEIS, at the Tribe's urging, now contains the hydrographs and stage duration curves (i.e. number of weeks high/low water depth exceeded) that existed in 2002 and show the impacts caused by Alternative 7R on WCA 3A, it does not contain hydrographs for other areas of the Everglades impacted by IOP. There should be hydrographs and stage duration curves, but are not, for all the WCAs, Lake Okeechobee and the estuaries. Nor does it contain modeling results for all the alternatives using the most current SFWMM model and an environmental analysis of each of them when compared to Alternative 7R, as would be expected in an SEIS. It also improperly lumps Test 7 together with ISOP and IOP when discussing high water impacts and makes no attempt in the text to separate the impact of IOP. Even though the Corps FSEIS now contains some details on the damage that IOP has caused, the FSEIS fails to analyze other reasonable alternatives or detail mitigation, as required by NEPA. The FSEIS should have included hydrographs and stage duration curves for all areas of the Everglades, and modeling results for all the alternatives compared with 7R, but failed to do so. The FSEIS also fails to comply with NEPA because it does NOT contain an adequate analysis of cumulative impacts. Id. at 86-87, Section 4.19.**MIT-18.**

MIT-18 Response: The FSEIS discusses the modeling results of all areas, although many areas were not significantly changed. The graphs and figures for all other areas were – and are still – provided on the Corps public website for IOP (http://hpm.saj.usace.army.mil***). There were significant differences between IOP and the 1995 Base for the southern WCA-3A area; however, there were not significant differences between IOP and the Current Base. All the modeling discussions were based on the SFWMM version 4.4. Test 7 was not lumped with ISOP. Test 7 was included as part of the 1995 Base; and ISOP was included as part of the Current Base. In the FSEIS, a discussion of the modeled selected alternative, ALT7R, like all other alternatives, was discussed sub-region by sub-region. In many cases, there were no new impacts from ALT7R, over the current base condition, to report.***

The Corps is violating its solemn Trust responsibility to the Tribe by continuing to operate Alternative 7R, while monitoring and reporting the death of the Everglades in WCA 3A being caused by IOP rather than conducting the analysis required under NEPA to prevent and mitigate for the damage. FSEIS at 75-81. It is tragic, indeed, that an agency directly under the President's Order to treat Indian Tribes on a government-to-government basis would ignore their duty to meaningfully consult with the Tribe on matters that would adversely impact their land and culture. An after-the-fact letter does not comply with this directive. It is even more tragic that the Corps has taken actions for the past eight years, four of them under IOP, that have caused, and will continue to cause, irreversible destruction to federal trust lands, and the Tribe's culture and way of life and have now recommended the continued operation of an alternative that will escalate that damage for 4 more years without conducting the analysis required by law. Id.

2. Tribe Was Proven Correct Right That An SEIS Was Required

In the Tribe's lawsuit against the Corps (Case No. 02-22778-Civ-Moore) it argued that the LOP Alternative 7R was a new alternative that contains new structural components, which were not analyzed in the prior DEIS or SEIS and, thus, the Corps was required to issue another SEIS. The Court agreed with the Tribe that the Corps violated NEPA and was required to issue an SEIS under NEPA. Court Order at 32-33. The Tribe continues to contend that these new temporary pumps and structures cannot be analyzed apart from the IOP project and that these structures are not MWD or C-111 Project components, as the Corps improperly suggests. FSEIS at 15-19. The Corps should divulge that the features constructed for IOP are "temporary" in nature and are not the permanent C-111 and Mod Waters features, but has not.**MIT-19.** Instead, it makes the misleading comment in response to the Tribe that they are "functionally equivalent" rather than divulge the truth to the public that they are not the same structures.

MIT-19 Response: The interim S-356 pump station was built at nearly identical geographic coordinate as the pump station (of the same number) shown in the 1992 Modified Water Deliveries GDM, with the same function. The impoundments and pump stations shown in the C-111 GRR, and authorized by the Water Resources Development Act of 1996, were clearly design modifications, typical, immaterial modifications made as the Corps obtains more detailed information, of those shown in that report in 1994. These structures were in fact discussed fully in the FSEIS and illustrated side-by-side. They are not different structures, but refinements to the feasibility-level design discussed in the FSEIS and authorized by Congress.

3. S-356-like Pump Experiment in the Field Violated NEPA MIT-20

The FEIS discusses field tests with the S-356-like temporary pump station that was hurriedly constructed at great expense (including a million dollar bonus for the contractor) in 2002 but which has never operated under IOP. The FSEIS fails to mention that while the Draft SEIS was out for public comment, on August 1, 2006, the Corps began conducting this experiment in the field to gather information for future Combined Structural and Operational Plan ("CSOP") operations. The Tribe filed a motion for preliminary injunction to stop this test claiming that it violated NEPA. The Corps suspended the test. The Tribe continues to contend

that this IOP temporary pump, which virtually has no way of operating under IOP, has no authorization under CSOP, and has NO EIS. The statement that the Tribe is part of an S-356 team that will conduct future field tests is incorrect. FSEIS at 19. The Tribe monitors the S-356-like pump station but has never agreed to be part of a S-356 team that conducts field tests.

In fact, the Tribe contends that the Corps' ongoing attempt to experiment in the field is yet just another example of the Corps taking actions that impact the human environment without completing NEPA. Even if the operation of the S-356-like pump was properly analyzed, which it has not been, that analysis would show that the pump is pulling tremendous amounts of ground water and discharging it in violation of Florida's Water Quality Standards. A rapid lowering of ground water levels was observed in several ground water wells located many miles from the S--356 during the unlawful test conducted this month. Pumping ground water and reintroducing those waters to surface waters amounts to pumping in a circle. The results of the Corps' unlawful pump test calls into question the very usefulness of the hastily constructed IOP temporary S-356-like pump station to control seepage in the L-31 canal since the test results indicate that huge volumes of groundwater are being pumped when it is in operation. Under the Mod Waters Project, the permanent S-356 pump is designed, and intended to be operated, to capture seepage out of Everglades National Park and WCA 3B and then return it to the Park, not to cause greater seepage and excessive ground water draw down.

MIT-20 Response: The function of the S-356 pump station under IOP is consistent with the authorized purpose of managing seepage from ENP into L-31N and returning it to ENP. As discussed in the FSEIS on pages 19-20, the operational guidelines included in the IOP are based on modeling simulations. While the model can calculate seepage rates from ENP to the canal, the empirical calculation cannot be directly translated to operational criteria to be implemented in the field. Pump tests are needed to further develop the relationship between hydrologic conditions in the field and the associated canal levels by which pumps will be governed to collect the seepage under various hydrologic conditions encountered in the field. The IOP modeling included operations of the S-356 pump to collect seepage and evaluation of its effects were included in the period of record modeling analyses. If new information warrants, we will supplement our NEPA documentation.

4. IOP Alternative 7R, the Action, Is An Improper No Action Alternative MIT-21

According to the FSEIS IOP, Alternative 7R is the "default" No Action. Alternative. FSEIS at 13, Section 2.28. This amounts to IOP 7R essentially being analyzed against itself. It is improper to use Alternative 7R both as the Recommended Alternative, and as the No Action alternative against which impacts are measured. This is nonsensical and turns NEPA on its head. The No Action alternative should be the last lawful Water Control Plan and regulation schedule that has gone through the reviews required by law, which was Test 7. Even if, as the Corps contends, it can not return to Test 7, it can still assess impacts against it.

MIT-21 Response: As determined by FWS, a return to Test 7 operations would jeopardize

continued existence of the CSSS. Calling IOP or Alt 7R the no action alternative was appropriate in this SEIS. It is the current operating plan. We know of no other alternatives that will avoid jeopardy until the rest of the Mod Waters structures are built and capable of operating. Had Test 7 been included it would have immediately been screened out.

5. FSEIS Fails to Analyze Cumulative Impacts MIT-22

Neither the 1998, 1999, 2000, 2001 or 2002 actions taken by the Corps were ever subject to the requisite EIS, and both ISOP and the after-the-fact FEIS on IOP were found to be not in compliance with NEPA. Thus, the Corps has now taken unanalyzed actions that have unknown environmental impacts for nine years. More chilling, the Corps has NEVER conducted a cumulative impact analysis that analyzes the combined impact that the past nine years of water management operations and other actions, coupled with four more years of IOP, will have on the human environment and listed species. NEPA requires that federal agencies consider "cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts" should be discussed in the same impact statement. 40 C.F.R. § 1508.25. In addition, 40 C.F.R. § 1508.7 defines a "cumulative impact" as the "impact on the environment which results from the incremental impact of the action when added to other past, present and other reasonable foreseeable future action" and thus requires analysis.

While the FSEIS now contains a list of some federal actions at Table 4.1, it still contains no analysis of the combined impacts of the 1999, 1998, 1999, 2000, 2001 and 2002 deviations, four more years of IOP operations, when combined with past and future actions, will have on the human environment. The mere listing of activities at Table 4.1 does not substitute for an analysis. FSEIS at 86-87, Section 4.19. Moreover, IOP and ISOP are not actions "needed to achieve the greatest possible hydrologic restoration of the Everglades," as the FSEIS suggests, but are instead actions that move further away from hydrologic restoration. Id. at 87. Additionally, the CERP analysis, which was conducted prior to IOP, could not have possibly analyzed any of its environmental impacts when coupled with other activities, as the Corps implies. Finally, the FSES make the unsupported claim that ISOP and IOP have "resulted in temporary adverse impacts to snail kites and upland islands in WCA 3A," without conducting the mandatory cumulative impacts analysis, including how four more years of IOP, when coupled with other past and future actions, will impact the environment.

The FSEIS also attempts to rely on the faulty FWS CAR, which was not based on the updated modeling for Alternative 7R and other alternatives, and the faulty 2006 Biological Opinion that does not contain an adequate environmental baseline and does not adequately analyze the effects that the past, present, and future deviations will have on the Wood Stork, Snail Kite and Snail Kite, to claim compliance under the ESA. Section 50 C.F.R. §402.02 states that the environmental baseline includes "the past and present impacts of all Federal, state or private actions and other human activities in the proposed action area." The FSEIS does not contain an adequate analysis of the cumulative impacts on endangered species and their critical habitats nor an adequate environmental baseline. Moreover, the current population estimates for

the Snail Kite that are detailed on pages 77-78 of the FSEIS disprove the prior unsupported assertion that the Snail Kite would not be adversely impacted by Alternative 7R and require the Corps to conduct such an analysis.

The Corps' IOP is a major federal action that significantly affects the physical environment, including, but not limited to, destruction of natural resources, flooding and degradation of the central Everglades in WCA-3A, a decrease in Everglades biodiversity, destruction of Everglades tree islands, injury to wildlife and increased flood risk. The Corps has violated NEPA for over nine years by choosing to merely monitor and document the destruction that its actions have caused, rather than adequately analyzing the impact that these actions (i.e. ISOP and IOP) would have on the human environment prior to taking them. The FSEIS continues to violate NEPA by failing to assess the cumulative impacts that past, present and future actions, when coupled with four more years of IOP, will have on the human environment and by not mitigating for them.

MIT-22 Response: EPA found the SEIS acceptable and the responses to MIT-1, 8, 13 include additional discussion on the cumulative effects. Since 1999, we have been operating under operational rules related to the CSSS, which impose constraints on other parts of the system. FWS concerns over the adverse effects of high stage durations and frequency in WCA-3A have been noted in the pages cited by the Tribe. However, the Corps, the FWS and ENP have not found a way to avoid these adverse effects and comply with the BO. The FWS has based its opinion on the cumulative effects and notes that operation of the C&SF Project and other hydrologic management has a significant effect on hydrologic conditions within most of the areas occupied by snail kites (FWS BO pg 61). The FWS BO further notes that two of the three highest stages within the period of record occurred in 1994 and 1995, which were prior to any emergency deviations for the CSSS, the ISOP or IOP operations (FWS BO pg 68).

6. FSEIS Fails to Contain A Health and Safety Analysis of High Water

The IOP FSEIS, like the FEIS before it, continues to remain silent on the public health and safety aspects that were addressed in the Final EA on the 1998 so-called emergency. The Corps does so despite the fact that it knows that IOP backs up water in the system and that it has come under fire lately about concerns for the integrity of the dike surrounding Lake Okeechobee caused by high water conditions.**MIT-23.** Page C-7 of the 1998 Final EA states,

> [t]he continued deviation from established water regulation schedules in order to minimize discharges south would increasingly tax the operation and capability of the system, especially for the upcoming wet season. Target elevations for the beginning of the wet season would probably be exceeded, even further reducing the system's ability to respond to events. There is an issue of increased risk to human safety due to high water levels in both Lake Okeechobee and the WCAs. Higher water levels during the wet season reduce the flood control capacity of the system.

The 1998 Final EA also states, under section 4.07, the consequences of extending the emergency that,

> Observations of the 1994-95 high water events have shown that if high water levels are maintained through the dry season, then water levels in WCA-3A remain excessively high during the following season, thereby reducing the overall storage capacity of the WCAs. Not only would this situation have exacerbated recent damage to the native upland communities in WCA-3A, but it could have also set the stage for re-enactment of the current emergency next year.

The FSEIS fails to address the issue of whether the resulting reduction in storage in the WCAs caused by IOP exacerbates the impacts that hurricanes and storms have had, and will continue to have, on the environment and urban and agricultural interests. Nor does it conduct the required analysis using updated SFWMM modeling to show the total high water impacts on the WCAs, Lake Okeechobee, and the St. Lucie and Caloosahatchee estuaries, as required by NEPA. Instead, the Corps makes the incorrect statement, which is contradicted by its prior EA, that Lake Okeechobee levels are not impacted by IOP in a response to the Tribe's comments in the appendices. See, FSEIS, Response to MIT 21. The Miccosukee Tribe is especially concerned by the Corps' refusal to address the health and safety issue, as they have faced an imminent threat in the past when a hurricane threatened at a time when the Corps had closed the S-12A structure and water threatened to overflow the structure. The perfunctory language on pre-storm operations in the FSEIS does not address the health and safety concerns raised by the Tribe. Nor does it address the integrity of the levee concerns that have been raised concerning Lake Okeechobee which result from high water.

MIT-23 Response: The concerns over the stability for Herbert Hoover Dike are directly related to rainfall on Lake Okeechobee and its contributing drainage basins (inflows into the Lake) and the impact these have to the stage of Lake Okeechobee. The inflow structures into Lake Okeechobee have a larger capacity than the outflow structures. Operationally, discharges from Lake Okeechobee are restricted by downstream capacity to all of the Lake's major outlets (C-43, C-44, and to the WCAs). The 2000 Herbert Hoover Dike Major Rehabilitation Report was undertaken to address problems related to piping, through-seepage, and structural stability of the Herbert Hoover Dike system. The USACE is currently working to implement/construct the necessary modifications to Herbert Hoover Dike to address the stability concerns for the Dike. To alleviate some of the pressure on the Dike itself until the construction is complete or other Projects come on line, the USACE is in the process of developing a new regulation schedule (Lake Okeechobee Regulation Schedule Study, LORSS) to replace the existing one (WSE). LORSS, this new schedule is expected to be implemented in October 2007, fully considered the inclusion of the IOP staggered closure criteria for the S-12 structures for the protection of the CSSS. In addition, there is an ongoing pilot project currently dredging upstream and downstream of S-12D structure expected to be completed by May 2007. The purpose of this pilot project is to evaluate the feasibility of cleaning out the intake and discharge channels of the S-12s and the viability of getting the dredged material to settle within a small stilling basin. The benefits of this pilot project will be the ability to restore

a large portion of the original conveyance capacity at S-12D, thus, allowing increase discharge capability via S-12D, which has been significantly reduced over the years due to vegetation growth and sediment accumulation. Based on the outcome of this pilot project, the final goal will be to perform similar dredging projects at all the S-12s.

7. The FSEIS Does Not Mitigate for the Devastating Damage in WCA 3A MIT-24

The updated version of the SFWMM model, which the Corps failed to use in the IOP FEIS, and that it was subsequently ordered to use by the Court, shows that Alternative 7R causes many more weeks of sustained high water in WCA 3A when compared to 95 base (pre-IOP) and even ISOP itself in Indicator Region 14. FSEIS at 43 and Appendix D; Attachment B. Upon protest by the Tribe that the DSEIS contained no actual modeling results for WCA 3A or other areas of the Everglades, the FSEIS now has SFWMM version 3.4 results for WCA 3A but not for the other WCAs, Lake Okeechobee or the St. Lucie and Caloosahatchee estuaries. Nor does the FSEIS contain modeling results using the most current version of the SFWMM model to conduct an analysis of the environmental consequences of other alternatives. The FSEIS admits that "one of the performance measures of interest in the WCA is the number of weeks the water would be above 2.5 feet." Id. It goes on to say that under RPA02, for example, there were 566 weeks with depths greater than 2.5 feet as compared to 519 for the 95 Base Mod 2 condition and 475 weeks for Alternative 1 condition in southern WCA 3A. Id.

While certain figures attached to the appendix in the FSEIS show average water elevation from 2002 to the present, they fail to compare this to the period of record and should do so. A review of the text shows that despite the Corps' past arguments that ISOP and IOP have not increased water levels in WCA 3A, the high water stages have decreased dramatically. The document admits that "stages in WCA 3A have exceeded 10.5 feet (3.2 m.) in 10 of the past 13 years, while there were only about 4 occurrences of stages exceeding 10.5 ft. (3.2 m.) during the 40-year period from 1953-1993." Id. at 76. However, the data to support these statements is not included in the FSEIS and should be, because NEPA is required to be a full disclosure document. It is improper under NEPA to not divulge these modeling results to the public.

The statement in the FEES that "[High water elevations during this time (as well as Pre-IOP) have resulted in damage to tree island vegetation, but it likely that this damage would have occurred with other alternatives" is not supported by the record, which contains no environmental impacts analysis and/or comparison of the other alternatives. FSEIS at 23, 65. The Corps' failed to conduct such an analysis even knowing that one of the "significant causes of habitat degradation are flood damage to tree islands in the northeastern and southwestern portions of WCA 3A," and that "[h]abitat quality in WCA 3A is changing progressively and dramatically to less desirable habitat in this critical area, and this conversion is rapid, with changes even after a year." Id. at 65, 79. The FSEIS further admits that, "the principal concern is that the habitat quality, and thus the carrying capacity of WCA 3A, is already seriously degraded." lit Despite these statements, the Corps continues to make the unsupported claim in its response to the Tribe's comments that the Corps does not agree that the operations under IOP are the likely cause of habitat degradation in WCA 3A. See, FSEIS Response at MIT 30.

These unsupported statements are belied by the fact that the Corps has known since at least 1997 that closing the gates would cause high water in WCA 3A to the detriment of the Tribe, the Everglades, and endangered species. Moreover, the Corps knows today that IOP has caused a rapid and alarming decline in both WCA 3A and the Snail Kite. FSEIS at 75-80. Some of these letters were attached as Exhibit G to the Tribe's comments on Draft EIS on IOP, and the Snail Kite Reports that document the devastating impact during ISOP and IOP are attached to these comments. These documents include:

December 24, 1997 letter from FWS and ENP states, "Moreover, our agencies cannot concur with any water management actions that would increase the current risk of extinction to the Cape sable seaside sparrow or result in unacceptable environmental damage to the Water Conservation Areas, Everglades National Park, Big Cypress National Preserve or other regional natural resources. Also, the Department of the Interior cannot concur with actions that damage or inflict unacceptable harm to other areas in the South Florida ecosystem, particularly the Water Conservation Areas." (emphasis added).

January 14, 1998, letter from the Florida Freshwater Fish Commission details the damage that high water levels have had on the WCAs.

January 15, 1998 letter from FWS states, "Because of these immediate adverse impacts on endangered wood storks, snail kites, and other federal trust resources, we do not endorse any water management actions that artificially increase water levels in the WCAs ... We have never recommended actions that protect the endangered Cape Sable seaside sparrow at the expense of other portions of the historic Everglades ecosystem." (emphasis added).

January 23, 1998, letter from the FGFWFC states, "observations during the 1994-95 high water events have shown that if high water levels in WCA-3A are maintained through the dry season, then the water levels in WCA-3A remain excessively high during the following wet season, thereby reducing the overall storage capacity of the WCA." (emphasis added).

February 2, 1998, letter from FWS "the proposed action may result in adverse effects on the endangered Snail Kite and Wood Stork, we agreed to complete an after-the-fact consultation per 50 CFR 402.05." (emphasis added). (Note: The after-the-fact consultation was never done.)

February 9, 1998, letter from Florida Game and Fresh Water Fish Commission discusses the impact that high water from 1998 emergency will have on WCAs and states that the actions proposed *in* that Draft EA will cause significant impacts and requires an EIS. (Note: an EIS was not done.)

February 13, 1998, letter from FWS to Colonel Miller, "Portions of WCA-3A are designated as critical habitat for the endangered snail kite. Maintaining high water levels during the dry season in WCA-3A may adversely modify the snail kite's critical habitat Maintaining high water levels in WCA-3A may adversely affect wood stork by delaying or precluding the initiating of nesting ... High water levels during the dry season are associated with reduced nesting effort and reduced nesting success for wood storks." (emphasis added).

Additional letters and documents include:

June 5, 1998, letter from FWS to Dexter Lehtinen states, "...we indicated to the Corps that holding high water levels in Water Conservation Area 3A to the possible detriment of the snail kite and the wood stork was not an acceptable option."

January 27, 1999, letter to SERA from the Florida Game and Fresh Water Fish Commission concerning the FWS draft B.O. states, "we remain adamantly opposed to the management of the Water Conservation Areas in such a way that artificially extends the six ears of high water that have damaged tree islands and destroyed willow stands since 1993." (emphasis added)

The Tribe submitted an affidavit by Dr. Ron Jones to the SEIS comments that says that even a few days of sustained high water in an area that has been severely stressed by years of high water, will cause irreparable harm to the tree islands; along with an affidavit by Colonel Terry Rice that contains a letter by FWS and a document by the SFWMD that shows that high water has reduced the tree island acreage in WCA-3A by 60%. (See, Tribe's comments on SEIS).

March 28, 2002 FWS Amended Biological Opinion states: "IOP Alternative 7R is not predicted to provide the same relief to the southern and eastern portions of WCA 3A as would the original RPA .... The disturbance intensity, or amount of snail kite critical habitat that could potentially be disturbed in southern and eastern WCA-3A, would be approximately 88,300 acres out of a total 841, 600 acres of designated critical habitat, or approximately 10.5 percent of the available designated critical habitat."

2003 Snail Kite Demography Annual Report: "The results presented in this report suggest that the snail kite population in Florida is going through an alarming declining phase. In particular, the population size of snail kites in Florida appears to have progressively and substantially decreased since 1999. In 1999, the snail kite population was estimated at 3577 individuals, whereas in 2003 this estimate had dropped to 1610 individuals." Attachment A-3 at 10. "Kitchens and Bennetts (2002) have hypothesized in WCA 3A (which is the most productive breeding site, (that the maintenance of prolonged hydroperiod (i.e. longer than under a natural regime) could negatively impact the foraging and breeding habitat used by the kite." Id. at 11. "[W]e believe that the fate of the snail kite population in Florida relies on the managers to minimize any activities that would be impacting the reproductive activities of kites, particularly in the designated critical habitats." Id. at 12. "We would however be supportive of a gradual reduction of water depths and hydroperiods, particularly in the western sector, which is by far the most productive in WCA 3A." Id. at 13. The Report further discusses the "immediate risk of extinction faced by this species." Id. at 15. See, Attachment A-3.

2004 Snail Kite Demography Annual Report: "Recent demographic results show alarming trends concerning the snail kite population in Florida." Attachment A-2 at Abstract. "The current regulation schedule in WCA 3A is shortening the window during which kites can breed." Id. "[O]ur radio telemetry data shows...most kites do not move as freely as previously thought between wetlands which are isolated by extensive areas of unsuitable habitats." See, Recommendations. "We would also like to reiterate our concern regarding the water regulation

of WCA 3A." Id. "In any event the schedule needs to be reconsidered for some flexibility to mitigate its potential negative impacts to kites." Id. see, Attachment A-2.

2005 Snail Kite Demography Annual Report: "The estimate of population size for 2005 does not indicate any significant recovery." Attachment A-1 at 3. "Proportionately, the large majority of birds fledged over time have been generated for the Water conservation Areas, principally WCA 3A, however in 2005 no young were fledged out of WCA 3A." Id. at 10. "Given the perennial contribution of the WCAs to the annual population of kites, there is little doubt at this point in time that the persistence of kites in Florida depends principally on the habitat quality within these wetlands. Current water regulation schedules in the WCAs have the potential to drastically shorten the window during which kits can breed successfully." Id. A recent telemetry study showed that... most kites do not move as freely as previously thought between wetlands which are isolated by extensive areas of unsuitable habitats:' Id. at 18. "Several researchers...have raised their concerns about potentially adverse effects of flooding in. WCA 3A. In recent years water levels in WCA 3A have been maintained at alarmingly high levels.." Id. at 19; see, Attachment A-1.

2006 Army Corps of Engineers IOP FSEIS: "Snail Kites have increasingly moved their nesting activity to higher elevations in WCA 3-A over the past two decades, presumably as the traditional nesting vegetation has been degraded by sustained high water levels due to water management practices." FSEIS at 79. Habitat quality in WCA 3A is changing progressively and dramatically to less desirable habitat in this area, and this conversion is rapid, with changes even after a year." Id. "The principal concern is that the habitat quality, and thus the carrying capacity of, WCA 3A is already seriously degraded." FSEIS at 79. "Since 2002, kite production in WCA 3A has dramatically dropped, having produced no kites in 2005." Id. at 77. "In 2005, nesting success was lower than during any year between 1992 and 2005. Id. Historically nests in WCA 3A have fledged proportionally the large majority of young in the region." Id. at 78. Dr. Wiley Kitchens believes that "this trend of lowered reproduction is a cause of concern regarding the sustainability of the population." Id.

MIT-24 Response: Science is constantly generating new data. The sparrow situation is not the same as it was believed to be in 1997, or 1998. New Biological Opinions were issued in 1999, in 2002 and in 2006. Test 7 is no longer a feasible option because of the "jeopardy" opinion .

The key figures for WCA-3A (Indicator Region #14 and #19) were provided in Appendix D of the FSEIS. As noted earlier in MIT-8, in IR #14, there was an increase from 494 weeks (over 31 years) to 563 weeks from the 1995 Base to the Current Conditions (Alt1CUR). There was only a 3 week increase from ALT7R over the Current Conditions. In IR #19, the opposite case was seen; there was a drop from 772 week to 600 weeks when going from the 1995 Base to the Current Conditions. There was a 6 week increase from the Current Base to ALT7R.

Figures showing the progression of impacts from the 1995 Base to the selected IOP alternative have been available on the public website (http://hpm.saj.usace.army.mil***). Cumulative impacts were analyzed in the IOP EIS and SEIS. The 1995 Base Condition***

(95MB4), representing operations in 1995 under Test 7, was modeled. Also modeled was existing conditions at the time IOP was under development (ALT1CUR). ALT1CUR included physical and operational changes in the system that had occurred after 1995 that were not represented in the 1995 Base model run (95BM4): WSE operations for Lake Okeechobee, Stormwater Treatment Areas, and ISOP operations. The modeling for IOP showed the cumulative impact of those actions and then compared those conditions to the IOP alternatives.

Additionally, the actual gauge recordings of water levels in WCA-3A provided and discussed in response to MIT-1, MIT-2 and MIT-13 comments (Figures 1, 2 and 3), show that there is no apparent trend indicating the S-12 spring closures have induced higher stages in southern WCA-3A.

The following mitigation actions were included in ALT7R: (1) The first operation was the inclusion of Zone E1 into the WCA-3A Regulatory Schedule. The goal of Zone E1 was to drawdown WCA-3A below the existing schedule to provide additional storage during the nesting period of the Cape Sable Seaside Sparrow. The zone sends water eastward as much as practicable, creating ½ foot of storage capacity in WCA-3A. (2) The second operation was the inclusion of passing water from WCA-3A to the South Dade Conveyance System. This operation is similar to the ISOP operation. The purpose of this operation is to pass water to the SDCS while the seasonal closure of the S-12s is in effect. (3) Pre-storm drawdown in the SDCS was included. Potentially, not only would the resulting storm stage would be reduce, but if a storm occurred during the seasonal S-12 closures, the ability to move water into the SDCS during this closure could be improved. (4) ALT7R opened S-12D all year, as opposed to the seasonal ISOP closure of "S-12D". (5) The final mitigation feature, which could not be modeled, was that ALT7R recognized the need for special consideration of requests from the Tribe.

At the end of October in 2005, the Tribe expressed strong objection to closing the S-12A and S-343A&B and S-344 on November 1, 2005 in accordance with IOP. The Tribe was heavily affected by flooding caused by Hurricane Wilma and requested the Corps avoid the closures. The Corps relayed this concern and received concurrence from the USFWS to delay the closure of S-12A until November 30, 2005. The Corps reiterates that IOP was a mediated, collaborative, interagency plan developed after previous draft plans were unacceptable to one or more stakeholding agencies. The Tribe's argument also appears to be based on the belief that operations are the only factor that determine water levels in WCA-3A. In fact water levels are very sensitive to direct rainfall and overall changes in climate. The period from 1990 to the present has been much wetter than previous periods of record, and many of the periods of prolonged high stages in WCA-3A are related to this climate change. This year (2007), in contrast, has been very dry. Stages in ENP and WCA3 are low.

8. FSEIS Fails to Adequately Assess Impact on Snail Kite and Its Critical Habitat MIT-25

The FSEIS acknowledges that Alternative 7R does not provide the same relief in terms of hydrologic improvements to the southern and eastern portions of WCA 3A as the original RPA, which was never implemented. FSEIS at 76. Yet, the FSEIS concludes without analysis, and based solely on the faulty FWS 2006 Biological Opinion, that four more years of IOP is not likely to jeopardize the Snail Kite or modify its critical habitat even while acknowledging that Dr. Wiley Kitchens has stated that the sustainability of the population is threatened. FSEIS at 76-81. Despite acknowledging the alarming decline in the Snail Kite population and its critical habitat in WCA 3A under IOP, the FSEIS fails to analyze the impacts of Alternative 7R on the Snail Kite, and the Snail Kite in WCA-3A against other alternatives, as required under NEPA. Id; Snail Kite Reports at Attachments A1-1, A-2 and A-3. Nor does the Corps even attempt to revise the IOP regulation schedule in response to the concerns and recommendations of the scientists. This is especially disturbing in light of the fact that the FSEIS admits that the Snail Kite population, and its habitat, has progressively and dramatically declined. Id. Second, the FSEIS contains no baseline study and cumulative impacts analysis of past, present and future actions, coupled with the additional four years that IOP, will have on the Snail Kite and its designated critical habitat. Third, the FSEIS does not divulge whether the Corps exceeded the high water criteria test, and thus the incidental take for the Snail Kite, in light of the information on its decline. There are no hydrological modeling results for the five year rolling average test that was mandated by the Incidental Take Statement in the 2002 Amended Biological Opinion.

The Corps was required to include the results in the FSEIS but failed to do so.

It is clear from the attached hydrological graph of WCA 3A for 2005, that water there was alarmingly high in the same year that no young fledged out of WCA 3A. Attachment C. Yet, the Corps' FSEIS contains no analysis of these high water levels impact using the 7R modeling to assess the environmental impacts of alternatives on the Snail Kite and its critical habitat. The Corps also ignores that Snail Kite researchers are concerned about the alarmingly high water levels in WCA 3A. Attachment A-1 at 19. It is the Corps' responsibility to see that any alternative it selects meets requirements of the ESA, and a review of the FSEIS shows that the agency has not met its duty. It is improper and unacceptable for the Corps to rely on the arbitrary and capricious conclusion that "The FWS, however, does not expect these changes over the next 4 years to have significant long-term impacts to the health of snail kites," and that "the habitat changes caused by IOP are reversible," when neither the Corps nor the FWS has conducted the analysis required under NEPA and the ESA required to support such a conclusion. Id. at 76.

The Corps can no longer evade the fact that sustained high water in WCA 3A has caused, and will continue to cause, adverse impacts to the Snail Kite and its designated critical habitat on Tribal Everglades in WCA 3A. These changes include the rapid conversion and degradation of the habitat and its carrying capacity in WCA 3A; the alarming decline in the Snail Kite population; and the fact that Dr. Wiley Kitchens is concerned about the sustainability of the Snail Kite population. FSEIS at 77-80; see also 2003, 2004 and 2005 Snail Kite Demography Annual Report at Attachments A-1, A-2 and A-3. The alarming degradation detailed at pages 75-80 of

the FSEIS, although not based on the required cumulative impacts analysis, are proof that IOP has devastated its critical habitat in WCA 3A. In fact, there is every reason to believe that four more years of IOP could lead to the extinction of Snail Kite and total destruction of its critical habitat in WCA 3A. The Corps should have included the hydrological modeling results for all parts of the Snail Kite's range, and analyzed the cumulative impacts of actions occurring in Lake Okeechobee and the Kissimmee, but failed to do so. The Corps is also required to look beyond the faulty FWS 2006 Biological Opinion, which arbitrarily and capriciously concluded that the destruction of more than a hundred thousand acres a year of Snail Kite critical habitat in WCA 3A would not jeopardize the Snail Kite, or cause adverse modification, to determine if it has. The Corps and FWS experiment in the field in WCA 3A has caused a dramatic decline in the Snail Kite as noted in the Final SEIS and the 2005 Snail Kite Report. Id.; Attachment A-1.

MIT-25 Response: This comment appears to elaborate on MIT-11, above. See Corps response to comment MIT-11. The Corps is committed to managing stages in WCA-3A, to the extent feasible, to make up for S-12 closures by releasing water using other structures to create storage capacity in WCA-3A prior to the closures (Zone E1) and to move water out of WCA to the SDCS during the closures (Column 2 operations).

9. FSEIS Fails to Meaningfully Analyze Flooding Impacts MIT-26

The FSEIS fails to adequately analyze the adverse impacts that raising the canal levels in L-31, as required under Alternative 7R, will have on urban and agricultural areas in Miami-Dade County. The Miami-Dade County Flooding Task Force has determined that the canal levels required by Alternative 7R caused increased flooding in Miami-Dade County in Hurricane Irene. A member of the public reviewing the FSEIS has no way of determining whether the Corps statements concerning the flood risk are accurate. Statements in the FSEIS, such as "the actual flood control capability within IOP is consistent with the modeling results" is meaningless without comparing it to previous operations. Additionally, simply pointing to high water conditions and labeling it a storm, does not give any indication of whether IOP has made the antecedent conditions worse as compared to prior plans. Moreover the FSEIS should analyze whether increasing the canal to 2.5 feet under marsh operations will increase the risk of flooding to agricultural and urban areas but does not.

MIT-26 Response: Hurricane Irene flooding occurred in West Miami in October of 1999, prior to implementation of IOP (IOP began in August of 2002).This reference is irrelevant to IOP. Pre-storm operations under IOP are an exception to the "normal operations." When extreme rainfall events occur some areas will become flooded, especially if a very high rainfall rate continues for several hours directly over the affected area. This occurred as Hurricane Katrina passed over western Dade County in 2005. The original FEIS for IOP evaluated flood mitigation effects of all alternatives 2002 (IOP FEIS, pp 61-63).

10. FSEIS Glances at Damage to WCA 3A and Ignores What It Sees MIT-27

The Corps no longer makes the ludicrous statement contained in the DSEIS that "potential impacts to tree islands have been minimized" and that "Alternative 7R would not have

adverse impacts on vegetation throughout WCA 3A." DSEIS at vi, 61. The FSEIS now details, but in all likelihood under-reports, the devastating consequences to WCA 3A. FSEIS at 75-80. The Corps continues, however, to make the absurd statement that the model runs of Alternative 7R predicted no significant increase over existing conditions is stages over 2.5 feet or longer stage durations in WCA 3A. Id. at 54. The Corps is only able to make this ludicrous statement, because it is improperly comparing IOP 7R (the Recommended Plan) and against IOP 7R (the No Action Alternative). In essence, while a review of the modeling shows that IOP causes many more weeks of sustained high water above 2.5 feet when compared to the 95 base, the Corps turns NEPA on its head by improperly comparing IOP 7R to itself! Indeed, the FSEIS contains proof in the form of environmental harm that this statement is incorrect. Id. at 75-81. The FSEIS admits that, "The principal concern is that the habitat Quality, and thus the carrying capacity, of WCA 3A is already seriously degraded. Although still preliminary, the studies tend to confirm these concerns." Id. at 79. There is ample evidence in the record to show that such harm has occurred and that the Corps' statements to the contrary are arbitrary and capricious. Id. at 75-81; Attachment A-1. The modeling results, and the actual hydrological data confirm that WCA 3A is drowning. Under NEPA, the Corps is required to take a "hard look" at that damage their IOP action is causing and to mitigate for that harm. The Corps has not done so. The Corps has also failed to look for harm that IOP is causing in WCA-3B, WCA-2A, Lake Okeechobee, the St. Lucie and Caloosahatchee River estuaries and Florida Bay. It is erroneous for the Corps to state that these areas will not be adversely impacted by the IOP without having taken the "hard look" at the cumulative impacts of their actions required by NEPA.

MIT-27 Response: Again, the Tribe is citing that portion of the FSEIS that specifically discusses the FWS evaluation of likely IOP impacts on snail kite habitat. The Corps does not dispute the FWS evaluation (see the BO, Appendix F) but agrees with FWS that if the CSSS subpopulation A issues can be resolved recovery of WCA-3A is feasible. Under the terms and conditions of the current BO the Corps cannot further lower stages in WCA-3A without adversely affecting the CSSS.

11. FSEIS Fails to Conduct the Mandatory Analysis of Alternatives MIT-28

Contrary to NEPA, the FSEIS fails to contain the mandatory analysis of the environmental impacts of the alternatives based on the updated SFWMM modeling in violation of NEPA and the Court's Order. FSEIS at 23. The Corps is required to issue a new SEIS on all alternatives doing so. The Corps also failed to analyze reasonable alternatives that would be better for the Snail Kite (including changes to the regulation schedule recommended by scientists) and those that would protect the Cape Sable Seaside Sparrow with far less impact on the rest of the Everglades and the endangered Snail Kite, including changes to the regulation schedule. The Tribe has provide affidavits and articles by Dr. Will Post and Dr. Jon Greenlaw, renowned sparrow scientists, that contend that localized strategies such as translocation, captive breeding and building dikes around nests that would be a more effective means of population recovery for the sparrow and would not cause damage to the other parts of the Everglades and the human environment. These alternatives were described in a paper published by Dr. Will Post and Dr. John Greenlaw in the Florida Naturalist, which has been provided to the Corps. In light of the information on the alarming decline in the Snail Kite discussed at pages 77-78 of the

FSEIS, and the decline of sub-population A of the Sparrow under ISOP and IOP, the Corps has a duty to analyze all reasonably foreseeable alternatives, including those that are not within the jurisdiction of the lead agency. 40 CFR §1502.14 (c). The FSEIS, while making an obscure comment that the Corps is considering "whether to implement another alternative," violated NEPA by failing to analyze the environmental impacts of any other alternatives. FSEIS at 5. As the discussion about the precipitous decline of WCA 3A at page 79 shows, the Corps' continuing failure to conduct the requisite alternatives analysis is damaging both to the Everglades and the future of Everglades restoration.

MIT-28 Response: The creation of Zone E1, as part of the Regulation Schedule for WCA-3A, was considered sufficient to meet the RPA requirements from FWS. The Corps must defer in this regard to both the FWS and recommendations of avian survival experts. According to FWS, the last Avian Science Workshop convened to address these issues in 2003, advised the Service to continue and discarded the alternatives such as translocation or captive breeding of CSSS.

FSEIS Fails to Disclose Costs of Destructive IOP and Other Alternatives MIT-29

The cost of implementing the Corps' prior ISOP was a staggering 9-10 million dollars, which was divulged in the so-called ISOP EA. The IOP FSEIS still fails to disclose the approximately $30 million dollars that IOP costs, as required under NEPA. Nor does it discuss the million dollar bonus given to the contractor to expedite the building of the S-356-like pump in 2002, which has never operated under IOP since it was constructed. The FSEIS not only neglects to divulge the multi-million dollar expenditure for the structural components of Alternative 7R, it does not divulge the source of the money. Nor does it discuss whether using this money for "temporary" IOP project features will cause the Corps to exceed their project budgets and delay the completion of the permanent Modified Water Deliveries and C-111 projects. The IOP cost information for each alternative was required to be provided under the *full* disclosure and cost benefit analysis requirements of NEPA but was not. Moreover, if the Corps is using MWD and C-111 funds for IOP 7R, it has exceeded its statutory authority and is violating NEPA by using funds contrary to the projects' purpose.

MIT-29 Response: Construction of portions of the authorized C-111 and MWD project features was coordinated with IOP implementation to provide additional capacity to remove water from the canals during periods of excess water as envisioned in the original design documents for those features. Construction was already planned and would have been done for the C-111 and MWD projects independently of IOP. The work was described as interim due to other potential changes that may occur in the future as CERP is implemented. The CERP plan recommends a change to the location of the S-356 pump station. The S-356 structure was planned as interim structure to facilitate eventual relocation under CERP. The C-111 detention area levees will most likely not be modified in the future and will become permanent project features. The final permanent C-111 pump station capacities are being further assessed under CSOP. The costs of the C-111 and MWD project features are captured in their respective project documents and submittals to Congress for annual project appropriations.

12. FSEIS Does Not Mitigate for Adverse Impacts to WCA 3A and Snail Kite MIT-30

The Corps' statement that 7R provides "the best practicable means to minimize or avoid adverse impacts" is not supported by the document. FSEIS at 104. The August 18, 2006 letter from EPA in the Appendix also opines that EPA could not find a commitment to mitigate for specific wetland losses. Also, keeping-12D open as part of Alternative 7R is not the mitigation for WCA 3A required under NEPA, since all four S-12s are supposed to be open in high water conditions. Additionally, in light of the fact that the closing of the gates under ISOP and IOP has caused an alarming decline in the Snail Kite population proves that there has been no mitigation. The scientists studying the Snail Kite have repeatedly warned that the regulation schedule needs to be reconsidered to mitigate both for high water and draw down conditions, yet the Corps has ignored these warnings. Attachments A-1, A-2 and A-3. The Corps' response to the Tribe's comments on the SDEIS that mitigation is necessary because IOP will restore wetlands and natural habitats is belied by the findings in the FSEIS that IOP has caused an alarming and rapid decline in the habitat in WCA 3A. FSEIS at 79. The Corps has violated NEPA by failing to mitigate for the harm that it knows that IOP has caused, and will continue to cause, for another 4 years by conducting a legally adequate SEIS but has not.

MIT-30 Response: The Corps is mitigating for IOP impacts to WCA-3A though careful management of water releases using all available structures, especially S-333 releases into L-29 canal, limiting inflow when necessary, and continuing to monitor both snail kite demographics and snail kite habitat according to the November 17, 2006, BO. Regarding the wetlands impacts of C-111 impoundment construction, we have responded that pumping and storing water in these structures assists in rehydrating the eastern Everglades marshlands that abut the western side of the impoundments. Given the fact that most of the land in impoundments was formerly rock-plowed farmland (prior converted wetlands) the wetlands functions lost have been more than offset by rehydration benefits in the Park. The required Clean Water Act Section 404 (b)(1) provides information on wetlands conversion acres.

Several mitigation features were included in ALT7R and presented in the FSEIS. The following mitigation actions were included in ALT7R: (1) The first operation was the inclusion of Zone E1 into the WCA-3A Regulatory Schedule. The goal of Zone E1 was to drawdown WCA-3A below the existing schedule to provide additional storage during the nesting period of the Cape Sable Seaside Sparrow. The zone sends water eastward as much as practicable, creating ½ foot of storage capacity in WCA-3A. (2) The second operation was the inclusion of passing water from WCA-3A to the South Dade Conveyance System. This operation is similar to the ISOP operation. The purpose of this operation is to pass water to the SDCS while the seasonal closure of the S-12s is in effect. (3) Pre-storm drawdown in the SDCS was included. Potentially, not only would the resulting storm stage would be reduce, but if a storm occurred during the seasonal S-12 closures, the ability to move water into the SDCS during this closure could be improved. (4) ALT7R opened S-12D all year, as opposed to the seasonal ISOP closure of "D". (5) The final mitigation feature, which could not be modeled, was that ALT7R recognized the need for special consideration of requests from the

Tribe.

14. FSEIS Fails to Disclose Unavoidable Adverse Impacts As Avoidable MIT-31

The Corps claims, without any analysis, that "the detention of excess water in the WCAs could also occur with the alternatives, and would likely continue in the future without the full implementation of the Modified Water Deliveries Project." FSEIS at 87. This is incorrect, since the Corps can stop some of this detention of excess water now. The Tribe agrees that the implementation of the MWD project is the ultimate solution, but contends that it is misleading for the Corps to state that the detention of excess water would occur without the completion of MWD, when they know that it can be relieved by the opening of the S-12 structures. Relief could be accomplished now by assessing other reasonable alternatives, which the Corps has failed to do in the IOP SEIS. The irreversible destruction of tree islands and the critical habitat in WCA 3A, and the devastating impacts on the culture and way of life of the Miccosukee Tribe, could be avoided by either the expeditious completion of the MWD project, or the adoption of a reasonable alternative that did not close the S-12 structures or modified the regulation schedule. The Corps should have analyzed other alternatives in its FSEIS, including reasonable ones that were not previously analyzed, and violated NEPA by failing to do so.

MIT-31 Response: To meet the requirement for ensuring that water level stays at or below 6.0 ft in CSSS subpop A for at least 60 consecutive days, the Corps determined through regional modeling that staged closures of the S-12 structures would maximize the potential for nesting success while balancing the concerns for high stages in WCA-3A (p 87, FSEIS) According to ESA, the Corps or other Federal Agency cannot fail to implement required actions under the most current Biological Opinion (Nov 17, 2006).

15. FSEIS Fails to Adequately Address Tribal Comments and Concerns MIT-32

The body of the Corps' FSEIS failed to acknowledge comments provided by the Tribe on the IOP. Nor does it discuss the fact that the Everglades in WCA 3A are Tribal lands. Instead, it erroneously concludes that IOP has caused no impacts to cultural resources or environmental justice impacts. FSEIS at 86, Section 4.18. It also fails to acknowledge that the Tribe, an Indian Tribe, is bearing the disproportionate adverse consequences of the Corps' IOP operations which are adversely impacting WCA 3A and the Tribe's culture and way of life. Finally, the Corps' response to many of the Tribe's comments are either pro forma, incorrect, or unsupported by the text in the document itself.

MIT-32 Response: Concerns about high stages in WCA-3A were discussed in the DSEIS and the FSEIS. There are many reasons why more long-term management of WCA-3A must develop solutions to the problem of adverse high stages and hydroperiods in WCA-3A. This problem was addressed in the 1999 C&SF Restudy; it was addressed as long ago as the Modified Water Deliveries GDM in 1992. It will be necessary to pass more water through WCA-3A into WCA-3B and, thence southward, across Tamiami Trail into the Northeast Shark River Slough and into ENP, in order to alleviate high stage and duration concerns in WCA-3a. The problem is that until the 8.5 Square Mile Area mitigation project is complete (projected for late this calendar year) and the approved Tamiami Trail Project is constructed, the Corps and

WMD cannot pass enough water out of WCA-3A under all conditions. Stages and hydroperiods are most adverse during wetter than average years, which may have become more frequent in the 1990's and 2000's than during previous climate periods.

16. Animal Farm Equality for the Everglades and Its Endangered Species MIT-33

The FSEIS makes it clear that in the eyes of the Corps and FWS, some parts of the Everglades, and some species, are more equal than others. The Corps and FWS are willing to see 184,320 acres in WCA 3A a year for the next four years destroyed and Snail Kites, which have undergone an alarming 50% decline, injured and killed, in return for a water management regime that has caused the decline of the western population of the Cape Sable seaside sparrow population that it was supposed to help. This is not only Animal Farm Equality for the Everglades, this single species management and selective protection is detrimental to the multi-species Everglades restoration effort and must be stopped. The Everglades is an ecosystem and must be treated as such under both NEPA and the ESA.

MIT-33 Response: Presumably a reference to George Orwell's Animal Farm in which "all animals were equal, but some were more equal than others." The determinations regarding endangered species and their critical habitat were made by US Fish and Wildlife Service based on science and advice of the avian ecologists consulted. Some of the differences that might have influenced the determination that the CSSS required more urgent protection measures, even if these measures might have detrimental effects on some snail kite critical habitat were: the CSSS population in the Everglades and Big Cypress is the only population of Cape Sable seaside sparrows in all the world, whereas the Everglade snail kite belongs to one of three subspecies of snail kite and is believed to have other populations in Cuba (2006 BO, p.75). In Florida, the snail kite has nesting colonies in northern Palm Beach County (Loxahatchee NWR and Grassy Waters Preserve), in Lake Okeechobee, in the Kissimmee Upper Chain of Lakes, and in the headwaters of the St. John's River in Indian River County. Furthermore it has shown more mobility and ability to translocate than the CSSS.

17. Irreversible and Irretrievable Commitment of Resources MIT-34

Section 4.23 of the FSEIS no longer states that the commitment of resources would be "temporary in nature, and the irreversible and irretrievable commitment of resources would be minimal," as it did in the DSEIS. This change is quite telling in connection with a review of pages 75-81 of the FSEIS, which details the alarming decline of the Tribal Everglades in WCA 3A and the endangered Snail Kite. IOP Alternative 7R has caused irreversible and irreparable harm to Tribal Everglades and the Snail Kite, in WCA-3A; caused the endangered Snail Kites population to decline by 50%; cause permanent damage to tree islands and incalculable harm to the Tribe's culture and way of life. However, the Corps fails to discuss this irreversible and irretrievable commitment of resources, as it is required to do under NEPA. Nor does this section discuss, as it should, the millions of dollars in taxpayer money that has been wasted on temporary IOP components.

MIT-34 Response: The Corps discussed irreversible and irretrievable commitments at FSEIS

p. 89. We do not believe that the snail kite (as a Florida population) has been irreversibly damaged by IOP features, based on the November 17, 2006, Biological Opinion. The Tribe states that the Tribal Everglades have been irreversibly damaged, but the Corps was required to operate the system to avoid jeopardy to the Cape Sable Seaside Sparrow. None of the moneys spent on construction of the C-111 and MWD project features being operated under IOP is "wasted money" from the viewpoint of the Corps. Construction of portions of the authorized C-111 and MWD project features was coordinated with IOP implementation to provide additional capacity to remove water from the canals during periods of excess water as envisioned in the original design documents for those features. Construction was already planned and would have been done for the C-111 and MWD projects independently of IOP. The Corps is repeatedly confronted with the dire need to complete the C-111 and MWD projects in public meetings and other forums by numerous stakeholders and interest groups including the Miccosukee Tribe.

18. FSEIS Fails to Adequately Analyze IOP Impacts on Water Quality MIT-35

The FSEIS claims, with no water quality modeling analysis, that Alternative 7R will not result in impacts to water quality. FSEIS at 58, Section 4.4. It fails to adequately analyze the impact that IOP is having, and could have, on water quality both in WCA 3A and Everglades National Park, including whether it is interfering with the Settlement Agreement requirements in the Everglades case before Judge Moreno. The FSEIS does state that the long term concentration limits for the Park, which are now in effect as of December 31, 2006, were not met during 2003 and 2005 but contains no analysis of IOP's contribution to this. Nor does it discuss any role that IOP may play in not meeting these limits in the future. It completely ignores any water quality impacts to WCA 3A. Letters from both DEP and EPA in the Appendix have also raised water quality concerns.

MIT-35 Response: The Florida DEP issued an Emergency Order after receiving reasonable assurances that IOP operations would not adversely affect water quality. WQ monitoring conducted for the Corps by SFWMD since August 2002 support the Corps expectation that IOP impoundments and operations would generally lead to compliance with state limits and regulations. The DSEIS and FSEIS beginning at p. 58 of the FSEIS included an analysis of water quality impacts that was accepted by DEP and EPA.

The purpose of the S356 Pump Station is to recycle seepage from the ENP and the SE corner of WCA 3B back into the ENP. Recycling this seepage water will allow higher stage levels in the ENP without increasing stages East of the L31N canal as well as reducing unnecessary losses to tide. Ground water and surface water from those two areas (ENP and WCA 3B) is generally the highest quality water in that area. The placement of these waters (ENP and SE WCA-3B seepage water) into the ENP is not considered a water quality matter that would require WQ modeling.

The water quality concern for this pump station is to ensure this feature only recycles the seepage water from the ENP and WCA 3B back into the ENP. The ground water system

(Biscayne Aquifer) is very close to the surface water system and is considered to be well connected and sometimes is directly connected to the surface water system (aquifer is at ground surface in some areas). Water from the east is considered to be of a higher risk (potentially lower in quality due to urban and agricultural influences) than the ENP/WCA 3B seepage water. Future pump tests will have the goals of confirming that there are no water quality problems in the present time frame as well as any potential future problems. The tests will enable confirmation of the zone of influence of the pump station (area of concern is to the East of L31N). Through additional pump tests, we can better define the zone of influence to ensure the ENP water quality is not negatively impacted as urbanization continues to move closer to the zone of influence. Water quality monitoring of these tests and future operations will provide continuous feedback to ensure that nothing detrimental is happening to the WQ of the ENP due to the operation of this pump station.

19. FSEIS Fails to Analyze the impacts of the FWS Proposed Rule MIT-36

The FSEIS acknowledges that FWS has issued a Proposed Rule for the revision of the Cape Sable seaside sparrow critical habitat (October 31, 2006; FR 63980). FSEIS at 68. The FSEIS, however, fails to contain any analysis of the environmental impact that the hydrological performance measure contained in the Proposed Rule, when coupled with IOP and other actions, will have on the Snail Kite and other and endangered species. A conference call with the FWS does not satisfy the Corps' NEPA or the ESA requirement to do so. A memo from Richard Punnett of the Corps that was attached to the previous SEIS concerning the CAR states: "The draft report fails to mention that both the "natural" and "restored" conditions will be less conducive to the western sparrow nesting (i.e. more nesting failures) than the 1995 base, ISOP or IOP conditions." The FSEIS continues to ignore this fact and continues to support the continuation of IOP Alternative 7R, which has devastated WCA 3A and caused a decline in the endangered Snail Kite. The Corps failed to analyze these very important issues in the FSEIS.

MIT-36 Response: The FSEIS is for Corps actions. The Corps cannot include an analysis of proposed FWS actions when the rule had not (and still has not) been promulgated as a final document. The Corps did coordinate a preliminary determination with FWS, in November, 2006, that IOP would not lead to adverse modification of the proposed new sparrow critical habitat in subpopulation "A". We would reinitiate consultation under Section 7 if necessary.

D. FSEIS DOES NOT COMPLY WITH THE APA MIT-37

The Corps' knowing and conscious failure to comply with NEPA, and the ESA, in completing its FSEIS is arbitrary and capricious, not in accordance with law, and in excess of statutory jurisdiction under the Administrative Procedures Act ("APA").

MIT-37 Response: The March 16, 2006 Court Order determined that the IOP FEIS did not violate APA. Normally EPA would determine a failure to comply with NEPA and as noted EPA has endorsed Alt 7R as indicated in its comments reproduced in this document.

E. THE CORPS DID NOT ADEQUATELY CONSULT UNDER FWCA MIT-38

The Corps has failed to follow the Fish and Wildlife Coordination Act (FWCA) of 1973, that requires an agency whose actions are likely to have adverse impacts on the environment and endangered species to enter into consultation with the Florida Fish and Wildlife Conservation Commission ("FFWCC") as part of the IOP FSEIS process. The FFWCC has raised concerns in the past about the high water levels in the WCAs being caused by the Corps' operations. The FSEIS contains no letters to the FFWCC seeking consultation. The FFWCC had raised concerns in the past about the failure to model the actual water management operations that would be employed in Alternative 7R and remain concerned about the deeper water conditions in WCA-3A and WCA-3B. The IOP FEIS does contain a letter from former FWS employee Mary Anne Poole, who actually worked on the 2002 Biological Opinion, but no comments from any of the scientists who had raised concerns. It appears that the Corps solicited the opinion of Ms. Poole, a former FWS employee, rather than seek the view of agency scientists who did not work for the FWS. The Corps should seek the input of these scientists.

MIT-38 Response: FWCC senior employee Ms Mary Ann Poole compiled FWCC comments for the DSEIS and FSEIS. The FSEIS is in full compliance with FWCA. Reference Florida State Clearinghouse compilation of comments.

F.FSEIS VIOLATES THE ENDANGERED SPECIES ACT MIT-39

1. FSEIS Fails to Analyze Cumulative Impacts on Endangered Species

The IOP FSEIS does not contain an analysis of the cumulative impacts of past, present, and future actions on the Snail Kite and other endangered species, as required under the Endangered Species Act ("ESA"). The Corps can not rely on the legally inadequate analysis of cumulative impacts of the FWS to predict the impact on the Snail Kite, Wood Stork and other endangered species but must conduct such an analysis itself. The IOP FSEIS discusses, but does not analyze, a number of actions that could have cumulative effects on these endangered species but fails to analyze them. The Corps is aware that IOP has had extremely detrimental impacts on the Snail Kite critical habitat in WCA 3A but failed to analyze the cumulative effects of other actions included in other parts of its range. FSEIS at 75-81. IOP has caused alarmingly high water levels in Snail Kite critical habitat in WCA 3A and there has been a 50% decline in the Endangered Snail Kite population. FSEIS at 77 and Attachment A-1 at 19. Nowhere in the Corps FSEIS does it analyze whether it has exceeded the incidental take for the Snail Kite under the five year rolling average test for high water, as it was required to do by the 2002 Incidental Take Statement.

The Corps' failure to comply with the ESA is a continuation of the violation of the ESA that has been well documented in Tribal correspondence with the Corps. The Tribe sent a 60 day Notice of Intent to Sue on March 16, 1998, informing the relevant agencies, including the Corps, about violations of the ESA that were occurring on Tribal lands as a result of their deviations from the regulation schedule - deviations that have occurred every year since 1998. (See Tribe's Comments on Draft EIS: composite exhibit F). The Tribe sent a supplementary 60 day letter to

the Corps on August 13, 2002. The Corps' failure to analyze past, present and future cumulative impacts of their previous deviations, coupled with the IOP, on the Snail Kite, Wood Stork, and other endangered species is a continuing violation of the ESA that has been ongoing since 1998.

As shown herein in Section B 7, and incorporated here, the Biological Opinion and numerous other letters from the FWS, ENP, and the Florida Game and Fresh Water Fish Commission, expressed grave concern about the adverse impacts to WCA-3A, and the endangered Wood Stork and Snail Kite that inhabit it, caused by maintaining high water levels in this area of the Everglades. More recently, scientists documenting the decline of the Snail Kite and the degradation of its critical habitat in WCA 3A have warned that the sustainability of its population is threatened. The Corps has ignored these warnings and continues to recommend that IOP Alternative 7R, which will continue to close the structures along Tamiami Trail and further endanger and threaten the Snail Kite and destroy the Snail Kite critical habitat on Tribal Everglades in WCA 3A, be implemented. The Corps can not rely on the inadequate FWS environmental baseline and the analysis but must conduct its own, including a cumulative impacts analysis of the proposed actions required under both NEPA and the ESA.

The Corps can not rely on FWS to meet its ESA requirements. The Corps has the duty to show that it will not violate the ESA, which it has failed to do in its legally and factually inadequate FSEIS. The Corps violated the ESA by failing to construct an environmental baseline and conduct a cumulative impacts analysis on the impact that IOP alternatives, coupled with other actions, will have on the Snail Kite and other endangered species based on the updated SFWMM model. The Corps also failed to comply with the ESA by not conducting the five year analysis it was required to do under the Incidental Take Statement in the 2002 Amended Biological Opinion to see if the incidental take of the Snail Kite had been exceeded in indicator regions 14 and 19, especially in light of the alarming decline of this endangered species.

2. FSEIS Based on A Faulty Biological Opinion and Inadequate Consultation

The ESA requires that biological opinions be prepared as part of the interagency consultation process to analyze whether proposed actions are likely to jeopardize the continued existence of endangered species. The Corps should have reinitiated consultation with FWS on the Draft SEIS immediately upon receiving the Court's March 14, 2006, Order mandating that an SEIS be conducted. Instead, the Corps waited until July 2006, after the Tribe had sued the FWS, to send a letter requesting consultation on the IOP SEIS even though it has known since March 15, 2002 that the IOP would adversely impact the endangered Snail Kite. This resulted in a hurried and inadequate consultation and FWS Biological Opinion which, among other things, contained an inadequate environmental baseline and inadequate analysis of cumulative impacts on endangered species, including the Snail Kite. The Corps' Draft SEIS should have contained a biological opinion that analyzed the impacts of Alternative 7R assessed against other alternatives, and their impact on the Snail Kite, Wood Stork, and the Sparrow based on current information and modeling when the document went out in draft form. The failure to do so deprived the public of meaningful comment.

3. IOP 7R Will Cause the Taking of Snail Kites

The Corps' KR Alternative 7R will cause the unrestricted taking of Snail Kites under high water conditions, the exceedance of incidental take of which the Corps will no longer analyze, despite its knowledge that the sustainability of the population is threatened. While the Tribe does not agree that the previous Incidental Take Statement contained in the 2002 Biological Opinion was adequate to protect the Snail Kite, the new Incidental Take Statement contains ever fewer checks on the taking of Snail Kites. There is no proper monitoring to ensure that the Snail Kite will be protected or that the level of incidental take has been exceeded. The Corps is violating Section 9 of the ESA, by the unrestricted take of Snail Kites under high water conditions and by adopting a water management plan that has, and will continue to, significantly degrade its designated critical habitat in WCA 3A. The Corps has a duty under the ESA to protect endangered species and their habitat, including a duty to conserve endangered and threatened species, but has failed to protect the endangered Snail Kite. Instead, FWS now predicts that the continued operation of IOP 7R will result in the degradation of 184, 320 acres of Snail Kite critical habitat per years for four years in WCA 3A (which is 21.9% of the 841,635 acres of total critical habitat and/or 57.7% of the 319, 078 acres of its WCA 3A critical habitat); which the Tribe contends will significantly degrade and modify Snail Kite critical habitat and allow the decline of the Snail Kite population to continue, and which constitutes a taking under the ESA.

MIT-39 Response: The FSEIS is based on receipt of a new Biological Opinion on the CSSS, the Wood Stork and the Snail Kite on November 17, 2006. The Corps has stated that it will comply fully with the requirements of this BO and has expanded monitoring in order to do so. The Service, as the agency assigned stewardship over the avian species referenced here, will determine Corps compliance or non-compliance. The Corps has been in continuous coordination with the Service since completion of the FSEIS to assure that all requirements of the 2006 BO are met. The BO does anticipate incidental take of snail kites but sets standards for when take exceeds permissible limits that would still assure viability of the species. The Corps does not have the authority to take sparrows to save the snail kite population in southern WCA-3A or elsewhere.

The November 2006 USFWS BO specifically removed the requirement to compute a five-year rolling average. However, the computation and discussion of the historical five-year rolling average from observed water level data is provided below per a request from the Tribe.

Five-year rolling averages were computed for the following gauges within WCA-3A: Site 62, 63, 64, and 65. The five-year average was computed by averaging the previous five years of data from any given date (i.e. to compute the five-year rolling average from April 1, 2007 the data points from April 1, 2002 through April 1, 2007 would be averaged). This process smoothes the data so that general trends might be discerned from the data. Three of the four gauge (Site 62, 53, and 64) locations have fairly short periods of record extending from 1991 to present, however Site 65's period of record extends back to 1953 which predates the impoundment to create the Water Conservation Areas (WCAs were completed by 1963).

Figure 4 shows the historical data for Site 65 as well as the computed five-year average. This figure shows that prior to impoundment of the Water Conservation Areas, based on a short

period of record, the area averaged approximately 8.25 ft., NGVD. After WCA construction, to achieve authorized project purposes, water was allowed to be impounded and the rolling average begins to increase approximately 1.5 feet. The Central and Southern Florida Project, Part I Coastal Areas South of St. Lucie Canal – Agricultural and Conservation Areas (With Preliminary Information on Lake Okeechobee and Principal Outlets) report dated July 10, 1951 page I-7 to I-8 states:

> ***The ultimate purposes of the conservation areas are to provide storage space for excess water which would otherwise be wastefully discharged to the ocean, to provide a source for dry season use in Everglades National Park and in the coastal area, to provide a depository for excess water from the agricultural area and other adjacent tributary areas, and to perform certain other auxiliary functions.***

From 1978 through 1993 (a relative dry period) the rolling average hovered approximately between 8.75 ft, NGVD and 9.25 ft., NGVD. The 1990's brought a wetter period and the rolling average increased to approximately 10 ft., NGVD. This period produced the highest peaks in the period of record: 1994-12.04ft; 1995-11.87ft; 1999-11.9 (all elevations are in NGVD). During the IOP operations, the rolling average decreased from the levels during the latter part of the 1990's by approximately 0.25 ft.

The other gauges (Site 62, 63, and 64; Figures 5, 6, and 7, respectively) with the shorter periods of record show the same general trend with the 1990's having higher stages than during IOP operations.

The results of the five-year rolling average should be used very carefully; statistically this average has a long term value but little or no short term value. Because the average is rolling through the period of record, it spans multiple operational criteria. Moreover, different periods had different climatic conditions. Accordingly, the value of the average for purposes of analysis or prediction is questionable, at best. For example, for the period under IOP operations to date, the 5 year average combines ISOP and Experimental Program operations depending on the particular date considered. An average for IOP cannot currently be computed because 5 years of data will not be available for IOP until July 2007. At this time, an initial five-year rolling average (one single value) of IOP operations could be generated.

The 2002 USFWS BO anticipated a comparison of model results verses observed data. Before this type of comparison can be made, the SFWMM model has to be updated to include the 5-year of meteorological data. In addition, the observed data includes many special operations that are not part of IOP. For example the observed data will reflect the effects of temporary deviations and special operations that were not included in IOP. The November 2006 USFWS BO specifically removed this requirement to compute this five-year rolling average.

G. FSEIS DOES NOT COMPLY WITH THE 5TH AMENDMENT MIT-40

The predetermined selection of IOP Alternative 7R in the Draft SEIS, which increases water levels in WCA-3A, deprives the Tribe, whose members will be adversely affected, of life, liberty or property without due process of law.

MIT-40 Response: The Miccosukee Tribe has repeatedly asserted claims based on alleged deprivation of property without due process of law in violation of the Fifth Amendment to the U.S. Constitution, and the courts have repeatedly rejected these claims. For example, the U.S. District Court for the Southern District of Florida previously held that the Tribe had failed to demonstrate the existence of a "special relationship" that would require government agencies to take further action to reduce water levels in WCA 3A. Miccosukee Tribe of Indians v. United States, 980 F. Supp. 448, 463-64 (S.D. Fla. 1997), aff'd, 163 F.3d 1359 (11th Cir. 1998) (table), cert. denied, 528 U.S. 810 (1999).

The U.S. District Court for the Southern District of Florida again rejected the Tribe's due process claims in an order filed April 28, 2003 in Case No. 02-22778, the currently pending IOP case. Magistrate Judge O'Sullivan found that the Administrative Procedure Act ("APA") provides an effective statutory remedy that precluded the Tribe from bringing a due process claim directly under the U.S. Constitution. DE # 135 at 3-5. Magistrate Judge O'Sullivan held that, in the alternative, if the Tribe's Fifth Amendment claims were not precluded by the APA, the Tribe has no constitutionally-protected property interests in WCA-3A. Id. at 7. "In so far as Congress explicitly retained the federal government's right to control water levels with WCA 3A, the Plaintiff cannot make a claim that it is being deprived of that same right due to the implementation of the IOP. The Federal Defendants are merely exercising a right reserved by them (control of water levels in WCA 3A) in a manner that is less preferable to the Plaintiff than a lower level might be." Id. at 8-9. Judge Moore overruled the Tribe's objections and adopted the Report and Recommendation in its entirety on August 6, 2003. Case No. 02-22778 DE # 142. Id. at 463-64.

Thus, the Tribe has no property rights in WCA 3A to support a Fifth Amendment claim. In any event, the Corps does not anticipate that any tribal member will be deprived of life, liberty, or property under IOP.

H. THE CORPS HAS NOT COMPLIED WITH THE INDIAN TRUST DOCTRINE AS REFLECTED IN THE INDIAN LAND CLAIMS SETTLEMENT ACT MIT-41

The Corps owes the Miccosukee Tribe of Indians a Trust obligation and fiduciary duty to protect tribal lands, resources, and assets pursuant to the federal Indian Trust Doctrine. This Trust obligation and fiduciary responsibility under the Indian Trust Doctrine extends protection to tribal lands, resources and assets recognized in the Florida Indian Land Claims Settlement Act, P.L. 97339. This law established a federal Miccosukee Indian Reservation and a perpetual lease in the area of the Everglades adversely impacted by the IOP. As shown in the FSEIS, Tribal lands within WCA-3A are being degraded and destroyed by the Corps' IOP Alternative 7R. The Corps has failed to conduct meaningful pre-decisional consultation with the Tribe on Alternative 7R. The Tribe does not consider an after-the-fact letter sent to them by Colonel Grosskruger after the DSEIS has been published either meaningful or pre-decisional. IOP Alternative 7R has

harmed the Tribal Everglades and its continued operation will continue to destroy these lands that are vital to the culture and way of life of the Tribe and which the Corps has a solemn responsibility to protect but chooses to ignore.

MIT-41 Response: The Miccosukee Tribe has repeatedly asserted claims based on alleged violations of Indian trust obligations, and the courts have repeatedly rejected these claims. For example, the U.S. District Court for the Southern District of Florida previously held that United States owed no specific legal duties to the Tribe beyond those found in applicable statutes, regulations, treaties, or other agreements. Miccosukee Tribe of Indians v. United States, 980 F. Supp. 448, 461 (S.D. Fla. 1997), aff'd, 163 F.3d 1359 (11th Cir. 1998) (table), cert.denied, 528 U.S. 810 (1999). In the case of the Corps, the Court held that its duty toward the Tribe was limited to managing the area pursuant to its authority under the C&SF Project. Id. at 462.

In a subsequent lawsuit, the U.S. District Court for the Southern District of Florida granted the United States' motion for partial judgment as to the Tribe's Indian Trust Doctrine claim. Case No. 00-33, DE # 63. The Court concluded that the Indian Trust Doctrine claim had the same defects as the claim rejected in the 1995 flooding case. "The Indian Trust Doctrine cannot support a substantive claim; rather, it provides a basis for determining whether Defendants' alleged conduct constitutes the breach of a duty, which arises from statute, regulation, treaty or other agreement." Id. at 2.

The U.S. District Court for the Southern District of Florida again rejected the Tribe's Indian Trust Doctrine claims in an order filed April 28, 2003 in Case No. 02-22778, the currently pending IOP case. Magistrate Judge O'Sullivan found that the Tribe's Indian Trust Doctrine claim was barred by collateral estoppel noting that, in Case No. 00-33, the Court had held that "the Indian Trust Doctrine cannot support a substantive claim; rather it provides a basis for determining whether Defendants' alleged conduct constitutes the breach of a duty, which arises from statute, regulation, treaty or other agreement." DE # 135 (quoting Case No. 00-0033, DE # 63 at 2). Judge Moore overruled the Tribe's objections and adopted the Report and Recommendation in its entirety on August 6, 2003. Case No. 02-22778 DE # 142.

Most recently, Judge Moore again rejected the Tribe's Indian Trust Doctrine claims in the Tribe's latest lawsuit, which challenges the FWS' biological opinion for IOP. Case. No. 05-23045. On May 15, 2006, Judge Moore partially granted the government's motion to dismiss the Tribe's Indian Trust claim. "This Court has repeatedly and unequivocally held that 'despite the general trust obligation of the United States to Native Americans, the government assumes no specific duties to Indian tribes beyond those found in applicable statutes, regulations, treaties, or other agreements." DE # 38 at 11, (quoting Miccosukee Tribe of Indians v. United States, 90 F. Supp. 448, 461 (S.D. Fla. 1997). With respect to the Indian Land Claims Settlement Act of 1982, the Court noted that "the 1982 Act merely authorizes the Secretary of the Interior to accept title to lands located in WCA 3a 'to be held in trust' for the benefit of the Tribe. Not only does it fail to establish an enforceable trust obligation, but it affirmatively denies the Tribe the right to 'interfere' with the actions of the Corps with respect to the water levels in WCA 3A."

To the extent the Corps has any general trust obligations in relation to the Miccosukee Tribe, the Corps fulfills such obligations through ongoing coordination with the Tribe

concerning the implementation of IOP. As noted in MIT-24 Response, the Corps has granted several requests from the Tribe to delay the closure of the S-12 structures.

CONCLUSION

The Corps' FSEIS fails to comply with NEPA, the ESA, the APA, the Indian Trust Doctrine, and the 5th Amendment to the U.S. Constitution. The Corps' legally insufficient and fundamentally flawed FSEIS is nothing more than a rubber stamp of 7R that does not cure the Corps' past NEPA, ESA, or other violations. Moreover, it does not comply with the Court's Order to conduct an IOP SEIS. For nine years, the Corps draconian water management actions, which to this day have not been the subject of a legally adequate EIS, have caused and will continue to cause, irreversible damage to Tribal lands in WCA-3A. These actions, not only endanger the Snail Kite and its critical habitat in WCA 3A, but the Tribe's entire culture and way of life, as well. The FSEIS contains concrete evidence of the vast devastation that "playing God with the Everglades" has caused to both WCA 3A and the endangered Snail Kite. This damage is being caused not only to Tribal lands, but to Lake Okeechobee and the estuaries, as well. The Corps and FWS have decided which endangered species and habitat will be protected and which will be sacrificed. This is contrary to their duty to protect all endangered and threatened species. Despite the evidence that vast areas of the Everglades, which Congress instructed the Corps to restore, are being destroyed by the same agencies that claim to be restoring it, the Corps continues to recommend the operation of IOP 7R in blissful disregard of the requirements of NEPA and other federal law.

The Corps has a Trust responsibility to the Miccosukee Tribe to protect its lands from further destruction but has failed to do so. It also has a duty under the ESA to stop the downward spiral toward extinction of the endangered Snail Kite. The Corps must take immediate steps to issue an SEIS that analyzes other alternatives, including any reasonable alternatives not previously analyzed; that complies with NEPA and the ESA; and that recommends an alternative that mitigates for the harm being caused to the Everglades and the Snail Kite. The Corps should also expedite the Mod Waters Project and CSOP. While the Corps' failure to complete Mod Waters has resulted in environmentally harmful plans, such as IOP, through which people's rights are violated and laws to protect the environment are ignored, the Everglades in WCA 3A, and the Snail Kite, can not wait until 2011 to see relief. The Corps must find a suitable alternative through a legally adequate IOP SEIS process, which it has failed to do. In short, the Corps' fundamentally flawed so-called FSEIS fails to comply with NEPA and other federal law, and its arbitrary and capricious selection of IOP will: violate people's rights, endanger the public health and safety; ensure the continued destruction of large portions of the Everglades (including Miccosukee Tribal Everglades); and threaten the future of Everglades Restoration. The environmental analyses required by law must be conducted in a new SEIS before there is no Everglades left to restore.

Florida Department of
Environmental Protection

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Michael W. Sole
Secretary

February 2, 2007

Ms. Barbara B. Cintron
Jacksonville District, Planning Division U.S. Army Corps of Engineers
Post Office Box 4970
Jacksonville, FL 32232-0019

RE: Department of the Army, Jacksonville District Corps of Engineers
Final Supplemental Environmental Impact Statement (SEIS) on the Interim Operational Plan (IOP) for Protection of the Cape Sable Seaside Sparrow, Everglades National Park – Miami-Dade County, Florida.
SAI # FL200612182970C (Reference SAI # F1.200605152302C)

Dear Ms. Cintron:

The Florida State Clearinghouse, pursuant to Presidential Executive Order 12372, Gubernatorial Executive Order 95-359, the Coastal Zone Management Act, 16, U.S.C. §§ 1451-1464, as amended, and the National Environmental Policy Act, 42 U.S.C. §§ 4231, 4331-4335, 4341-4347, as amended, has coordinated a review of the referenced Final SEIS.

The Florida Department of Environmental Protection (DEP) encourages the Corps of Engineers to expedite and complete the Modified Water Deliveries and C-111 Projects, including completion of all the C-111 detention areas. In order to reduce the effects of IOP operations on snail kites and their habitat, high water levels, and the rapid recession in the water conservation areas should be minimized, The DEP recommends using the available hydrologic and meteorological data coupled with water quality, and biological monitoring to assist in the management of the plan to protect resources in the water conservation areas. In addition, coordination with the U.S. Fish and Wildlife Service (USFWS), South Florida Water Management District, and other stakeholders to evaluate operational protocols should be continued.**DEP-1**

The South Florida Water Management District (SFWMD) advises that the minimum level of flood protection acceptable for the C-111 canal basin must equal or exceed ISOP 2001 and that the 8.5 Square Mile Area (SMA) must provide drainage equal to or superior than the performance identified in the 8.5 SMA 2000 GRR. Unfortunately, the Biological Opinion prepared by the LISFWS, which was not included in the Draft SEIS, includes language that may restrict the operation of the S-332B, S-332C and S-332D detention areas. Staff requests clarification on several sections of the Final SEIS regarding potential operational constraints on the S-332 Detention Areas, current IOP for Protection of the CSSS, and Combined Structural and Operation Plan (CSOP) for the Modified Water Deliveries to Everglades National Park and the C-111 Canal Project. Please address the items outlined in detail in the enclosed DEP memorandum and SFWMD letter.

The Florida Department of Agriculture and Consumer Services (FDACS) Office of Agricultural Water Policy advises that the agency remains concerned about the type of flood protection analyses that have been done for the project. Previously expressed concerns have not been addressed b the Corps of Engineers. The FDACS restates its position that the additional flood storage capacity and structures that have been added could address the concerns with changes to the L-31N canal level operations. In order to reduce flooding impacts and meet the ecological objectives, FDACS supports the implementation of Alternative I. Staff continues to be strongly opposed to the adoption of Alternative 7R. Please refer to the enclosed FDACS letter for further information.

The Florida Department of Transportation (FDOT) District Six Environment Section notes that the Final SEIS provides for a water elevation in the L-29 Canal of up to 9.0 feet. NGVD. As the FDOT has previously advised, water elevations in the L-29 canal adjacent to U.S. 90 / S.R. 41 / Tamiami Trail must not exceed 7.5 feet NGVD for more than 24 hours, as this provides barely adequate protection for the base of the existing road in some areas. If there are any questions, please contact Ms. Barbara Culhane at (305) 470-5231.

Based on the information contained in the Final SEIS and the enclosed state agency comments, the state has determined that, at this stage, the proposed activities are consistent with the Florida Coastal Management Program (FCMP). The concerns identified by our reviewing agencies must be addressed prior to project implementation. The states continued concurrence with the project will be based, in part, on the adequate resolution of issues identified during this and subsequent reviews. The state's final review of the project's consistency with the FCMP will be conducted during the environmental permitting stage.

Thank you for the opportunity to review the proposed project. Should you have any questions regarding this letter, please contact Mr. Christopher J. Stahl at (850) 245-2169.

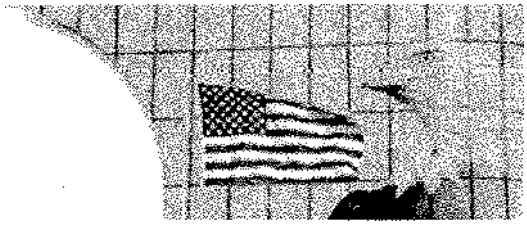
Sincerely,

Sally B. Mann

Sally B. Mann, Director
Office of Intergovernmental Programs

SBM/cjs
Enclosures

cc: John Outland, DEP, MS 45
Greg Knecht, DEP, MS 3560
Tim Gray, DEP, Southeast District
Jim Golden, SFWMD
Forrest Watson, FDACS
Linda McCarthy, FDACS
Lisa Stone, FDOT



***DEP-1 Response:** Completion of all parts of MWD and C-111 Projects is the desire of the Corps. However, construction depends on appropriations of funding by Congress. Rapid recessions in the WCAs may also be caused by drought conditions, as has occurred this year and during previous droughts. The Corps, in close coordination with the WMD, does use and will use the available hydrologic and meteorological data to manage the system to achieve its multiple purposes.*

Project Information		
Project:	FL200612182970C	I
Comments Due:	01/19/2007	
Letter Due:	02/02/2007	
Description:	DEPARTMENT OF THE ARMY. JACKSONVILLE DISTRICT CORPS OF ENGINEERS - FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (SEIS) ON THE INTERIM OPERATIONAL PLAN (IOP) FOR PROTECTION OF THE CAPE SABLE SEASIDE SPARROW. EVERGLADES NATIONAL PARK - MIAMI-DADE COUNTY, FLORIDA.	
Keywords:	ACOE - FSEIS, IOP FOR CAPE SABLE SEASIDE SPARROW - MIAMI-DADE CO.	
CFDA #:	99.997	

Agency Comments:

SOUTH FL RPC - SOUTH FLORIDA REGIONAL PLANNING COUNCIL

No Comment

MIAMI-DADE - 1

No Comment

AGRICULTURE - **FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES**

The FDACS Office of Agricultural Water Policy advises that the agency remains concerned about the type of flood protection analyses that have been done for the project. Previously expressed concerns have not been addressed by the Corps of Engineers. The MACS restates its position that the additional flood storage capacity and structures that have been added could address the concerns with changes to the L-31N canal level operations. In order to reduce flooding impacts and meet the ecological objectives, FDACS supports the implementation of Alternative 1. Staff continues to be strongly opposed to the adoption of Alternative 7R.

FISH and WILDLIFE **COMMISSION - FLORIDA FISH AND WILDLIFE CONSERVATION**

NO **COMMENT** BY **MARY** ANN POOLE ON 12/21/2006.

S T A T E - F L O R I D A D E P A R T M E N T O F S T A T E

No Comment/Consistent

TRANSPORTATION - FLORIDA DEPARTMENT OF TRANSPORTATION 1

The FDOT District Six Environment Section has reviewed the above referenced project and provides the following The Interim Operational Plan (IOP) for Protection of the Cape Sable Seaside Sparrow (December 2006) provides elevation in the L-29 Canal of up to 9.0 feet NGVD. As the FDOT has previously advised, water elevations in the L-29 adjacent to U.S. 90 / S.R. 41 / Tamiami Trail must not exceed 7.5 feet NGVD for more than 24 hours, as this adequate protection for the base of the existing road in some areas. Thank you for the opportunity to comment important project. If there are any questions, please contact Ms. Barbara Culhane at (305) 470-5231.

ENVIRONMENTAL PROTECTION - FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION 1

We encourage the Corps to expedite and complete the Modified Water Deliveries and C-111 Projects, including completion of all the C-111 detention areas. In order to reduce the effects of IOP operations on snail kites and their habitat, high water levels and the rapid recession in the WCAs should be minimized. We recommend using the available hydrologic and meteorological data coupled with water quality, and biological monitoring to assist in the management of the plan. In addition, coordination with the USFWS, the SFWMD and other stakeholders in evaluating operational protocols should be continued. Please see our memo for detailed information.

SOUTH FLORIDA WMD - SOUTH FLORIDA WATER **MANAGEMENT** DISTRICT

The SFWMD advises that the minimum level of flood protection acceptable for the C-111 canal basin must equal ISOP 2001 and that the 8.5 Square Mile Area (SMA) must provide drainage equal to or superior than the identified in the 8.5 SMA 2000 GRR. Unfortunately, the Biological Opinion prepared by the USFWS, which was not the draft SEIS, includes language that may restrict the operation of the S-332B, S-332C, and S-332D detention requests clarification on several sections of the FSEIS regarding potential operational constraints on the S-332 Areas, current IOP for Protection of the CSSS, and Combined Structural and Operation Plan (CSOP) for the Deliveries to Everglades National Park and the C-111 Canal Project.

Memorandum

TO: Florida State Clearinghouse

THROUGH: Greg Knecht, Administrator
Water Quality Standards & Special Projects Program

FROM: John Outland, Inger Hansen

DATE: January 25, 2007

SUBJECT: Department of the Army, Jacksonville District Corps of Engineers — Final Supplemental Environmental Impact Statement (FSEIS) on the Interim Operational Plan (IOP) for the Protection of the Cape Sable Seaside Sparrow, Everglades National Park — Miami-Dade County, Florida.

SAI #: FL06-2970C

Background:
The subject document supplements the 2002 Final Environmental Impact Statement (FEIS) for the Interim Operational Plan for the Protection of the Cape Sable Seaside Sparrow. Alternative 7R was the recommended alternative in the 2002 IOP FEIS and the system has been operating under IOP since August 2002. This FSEIS discusses the actual operation since IOP began in 2002. Structural features constructed of Alternative 7R include pump stations S-356 and S-332C, degrading 4 miles of the L-67 levee extension and three new detention areas at S-332B, C and D. The construction features were authorized under the Modified Water Deliveries and C111 Projects. The U.S. Fish and Wildlife Service has determined that continued operation of Alternative 7R is not likely to jeopardize the continued existence of the Sparrow, Everglades Snail Kite or Wood Stork and is not likely to destroy or adversely modify designated habitat for the Sparrow or Everglades Snail Kite.

Comments:
The Department continues to be concerned about the unintended consequences of implementing Alternative 7R and the IOP operational management of high water levels in Water Conservation Area 3A for protection of the Cape Sable Seaside Sparrow (caused by closing of S 12 structures to protect Subpopulation A in Everglades National Park, just downstream of Water Conservation Area 3A). The FSEIS documents the shift in vegetation communities and the degradation of nesting and foraging habitat for protected species including the endangered Wood Stork and endangered Everglades Snail Kite within WCA 3A making it necessary for the U.S. Fish and Wildlife Service to issue a Biological Opinion allowing for the incidental take for kite nest within the designated critical habitat area of WCA 3A.

In further support of our concern for the snail kite population in the WCAs, the document states that the USFWS concludes in their 2006 Biological Opinion that *"Continued IOP operations are expected to result in continued habitat degradation within WCA 3A, which has been one of the most significant areas of kite habitat within the past 30 years. In addition, LOP operations are expected to result in reduced nesting success of kites within WCa-3A, reduced foraging habitat suitability, and reduced abundance of the kite's primary prey."* **DEP-2.**

DEP-2 Response: As noted in response to MIT-1, Model runs for Alt 7R only showed about a 1% increase in high stages in WCA-3A, compared to previous alternatives. The problem will further be alleviated when the MWD project Conveyance Structures through L--67A and C levees are constructed and operational under CSOP, the successor operational plan to IOP. The ultimate solution to reducing the high water conditions in WCA-3A resulting from the C&SF Project are planned as part of CERP. The IOP is an "interim" operational plan for protection of the CSSS and cannot achieve the goals of the CERP plan without the major structural modifications associated with CERP in place.

Section 2.2.8 states that Alternative 7R is the current operation plan which was implemented after the Record of Decision was signed in 2002, and goes on to make a statement that the construction of the S-356 Pump Station adds flexibility into the IOP operations. Since Alternative 7R has not yet been fully implemented, it is important to clearly state that Alternative 7R does not represent the actual current conditions. Not having the base conditions or existing operational conditions defined in terms of actual operational conditions continues to be a cause of concern. The Final EIS included a pre-storm Operation Plan that was not included in the Draft EIS. It is not clear from the information provided that Alternative 7R together with the pre-storm operation have sufficiently addressed the flood control requirements. **DEP-3.**

DEP-3 Response: The Corps concurs that IOP does not represent current conditions. The FSEIS recognizes that IOP will be implemented incrementally. See FSEIS pages 20-23.

On page 22 there is information regarding the permitting status of the mod waters components, including S-356 and what is referred to as the "S-335 A/B pump structures." On January 9, 2007, the Jacksonville District Corps of Engineers submitted a permit application to the Department to allow for operation of the S-355 A and B gated weir structures. We are currently reviewing this application for completeness. We do not have a current permit application for the S-356 pump station. **DEP-4.**

DEP-4 Response: Prior to submission of a permit application, the Corps is working with DEP on testing of S-356. The Corps will obtain DEP authorization for tests. Tests will reduce uncertainty about the zone of influence and constraints on field operations to insure pumping achieves the purpose of seepage return.

When sufficient information is obtained, a permit application will be submitted to DEP. See FSESI page 23 and MIT-20. .

Recommendation:
We encourage the Corps to expedite and complete the Modified Water Deliveries and C-111 Projects, including completion of all the C-111 detention areas.

In order to reduce the effects of IOP operations on snail kites and their habitat, high water levels and the rapid recession in the WCAs should be minimized. We recommend using the available hydrologic and meteorological data coupled with water quality, and biological monitoring to assist in the management of the plan. In addition, coordination with the USFWS, the SFWMD and other stakeholders in evaluating operational protocols should be continued.

cc: Tim Gray (cc)
Nora Gluch (cc)

SOUTH FLORIDA WATER MANAGEMENT DISTRICT

3301 Gun Club Road, West Palm Beach, Florida 33406 • (561) 686-8800 • FL WATS 1-800-432-2045 • TDD (561) 697-2574
Mailing Address: P.O. Box 24680, West Palm Beach, FL 33416-4680 • wwtssfwmd.gov

January 29, 2007

Ms. Lauren Milligan, Coordinator
Florida State Clearinghouse
3900 Commonwealth Boulevard, MS-47
Tallahassee, FL 32399-3000

Received FEB 0 1 2007

SUBJECT: South Florida Water Management District Comments on the Draft Supplemental Environmental Impact Statement for the Interim Operational Plan for Protection of the Cape Sable Seaside Sparrow (June 2006)

Clearinghouse Number No. FL200605152302C

Dear Ms. Milligan:

Below are the South Florida Water Management District's (SFWMD's) comments on the Draft Supplemental Environmental Impact Statement (DSEIS) for the Final Interim Operational Plan (IOP) for Protection of the Cape Sable Seaside Sparrow (CSSS) dated December 2006. Please note that the lack of comments on the draft SEIS on the level of flood protection provided by the IOP for Protection of the CSSS in no way reduces the concerns expressed by the SFWMD during the development of the IOP for Protection of the CSSS. The draft SEIS did not propose operational changes so the SFWMD did not restate previous concerns over the level of flood protection provided by the 1OP for Protection of the CSSS as the SFWMD hoped that these concerns would be resolved through CSOP. The SFWMD Governing Board has given direction that for the C-111 canal basin the minimum level of flood protection acceptable shall equal or exceed ISOP 2001 and that the 8.5 Square Mile Area (SMA) shall provide drainage equal to or superior than the performance identified in the 8.5 SMA 2000 GAR. Unfortunately, the Biological Opinion *prepared by* the Fish *and* Wildlife Service (FWS), which was not included in the draft SEIS, has language which may restrict the operation of the S-332B, S-332C, and S-332D detention areas operation. Accordingly please incorporate the comment provided by the SFWMD during the development of IOP for Protection of the CSSS into the USACE's administrative record for this SEIS.

Comments

1. The SFWMD is very concerned about the operation limits being imposed by the following text (page 75) within the Amount or Extent of Take section for the CSSS.

> *Operation of the S-332 structures may result in flooding of sparrow nests that occur within 0.6 mile of the S-332 Detention Areas, either because of increased water levels resulting from seepage or from overflow from the detention areas*

directly into sparrow habitat within ENP. This will result in loss of the contents of all nests within 0.6 mile of S-332, estimated to be to eight egg/nestlings per year based on observational data. Operation of the detention areas that result in transitions from groundwater conditions to surface water conditions beyond 0.6 mile from the detention areas prior to June 1 will result in incidental take not exempted in this opinion. In addition, operations that increase surface water levels by greater than 3.9 inches beyond 0.6 mile from the detention area will exceed incidental take.

This language is unclear and provides no references to supporting scientific data either hydrological or biological. Specifically it is unclear whether this language applies to the S-332B and S-332C detention areas or the S-332B, S-332C, and S-332 D detention areas. The text requires compliance before June 1 without providing a start date so it is unclear how long this requirement is imposed (e.g. from January 1st through June 1st). If the intent of these criteria is to protect nesting then shouldn't the criteria only apply for a reasonable nesting period such as March through May. The limit of 3.9 inches implies an accuracy which is not practical. The FWS fails to describe how it is technologically feasible to separate water *level rises* associated with the detention area from other factors such as rainfall and surface water flow in the time frame required for real time operations.**SFWMD-1.**

The SFWMD is concerned with how this language could constrain current IOP for Protection of the CSSS operations and future operation under the Combined Structural and Operation Plan (CSOP) for the Modified Water Deliveries to Everglades National Park (MWD ENP) and the C-111 Canal Project. None of these criteria were provided to the agencies or stakeholders involved in the CSOP process during the multi year modeling effort, so these criteria was not be assessed.**SFWMD-2.**

This language conflicts with a fundamental project purpose of the detention areas which is reducing seepage from eastern ENP and thereby maintaining higher water levels in eastern ENP. The relatively low porosity in the rocky glades (-0.15) results in groundwater rises of about 7 inches for a one inch rainfall event. Therefore when water levels are maintained near ground surface as desired for restoration the likelihood of violating this criteria greatly increased. If this text is applied without 1) reasonable time period for implementation (e.g. March through May), 2) clear criteria which includes flexibility to maintain drainage, 3) flexibility to mitigate impact to other species, and 4) clear criteria for terminating the criteria due to rainfall it could substantively reduce the benefits of the project and result in the need for the installation of a costly seepage barrier.**SFWMD-3.**

2. The expansion of the sparrow nesting season to the time period from February 15 through August 31 (page 79 of the FWS BO) is a substantive change from the previous Biological Opinion which had a potential nesting period from March through July 15. This change extends the nesting period halfway through the raining

season. The FWS should provide justification, including scientific data for this change and provide criteria which determine both the start (e.g. water level below a certain stage for a set time period) and end (based on a fixed stage or rainfall) of the potential nesting season.**SFWMD-4.**

3. The SEIS should clearly state that the incomplete condition of the detention systems between S-332B North and S-332D is due to a lack of funding by the USACE as the land swap was executed by the SFWMD in time for construction in the 2006 through 2007 dry season.**SFWMD-5.** The incomplete detention area severely limits the ability of IOP for Protection of the CSSS to distribute water along the approximately five mile north south distance from S-332B North to S-332D.

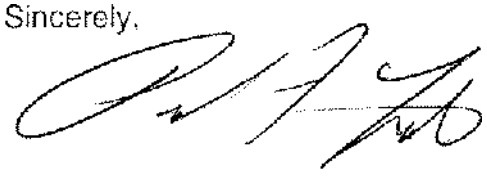
4. The description of marsh operation needs to clarify that marsh operations developed in the Combined Structural and Operation Plan (CSOP) for the Modified Water Deliveries to Everglades National Park (MWD ENP) project and the C-111 Canal project, was developed after implementation of the Interim Operational Plan for Protection of the Cape Sable Seaside Sparrow (IOP for Protection of the CSSS).**SFWMD-6.**

5. Description of the S-356 operations needs to acknowledge that water pumped by the S-356 pump is seepage collected by the L-31N canal and seepage collected by the L-30 canal discharged via the 5-335 structure into the L-31 N canal. The seepage into the L-30 canal arises primarily from WCA-3B and the Pennsuco Wetlands. Seepage into the L-31 N canal arises predominately from the West (WCA-3B and Northeast Shark Slough) and secondarily from the East.**SFWMD-7.**

6. The Biological Opinion dated November 17, 2006 also includes numerous inaccuracies in the project description and operations. The SFWMD will provide the USACE with a list of the inaccuracies separately.**SFWMD-8.**

Thank you for the opportunity to comment on the DSEIS IOP. Again, we request that these comments be included in the Corps' formal administrative record.

Sincerely,



Paul Ferguson Linton
Chief Consulting Engineer
Watershed Management Department
South Florida Water Management District

PL/bg

c: Dr. Jon Moulding, U.S. Army Corps of Engineers

SFWMD-1 Response: Thank you for your comments, which we will share with Service biologists. The Corps cannot unilaterally change the language in the BO. However, we will coordinate your concerns with FWS and attempt to achieve a clarification of the intention and meaning of the requirements.'

SFWMD-2 Response: The Corps and the Service are continually trying to update the information related to endangered species. Some of the current recommendations of the Service relate to the data gathered during summer and fall of 2006 during preparation of the November 17, 2006, BO for this FSEIS. It will be available to the CSOP PDT as this team continues to develop its TSP.

SFWMD-3 Response: The FWS supports IOP Alt 7R, which includes storm and pre-storm operations. We presume these operations are an "exception" to "normal IOP operations. The Corps is still developing marsh operations for the C-111 detention areas. Monitoring wells were just installed last summer and this rainy season will be the first opportunity to manage the system adaptively.

SFWMD-4 Response: The Corps understands that the scientists studying the sparrow provided new information, derived from new scientific studies, about nesting and other aspects of sparrow biology, which led to a re-definition of the nesting season. We will communicate your request for stage correlates to beginning and end of the nesting season to the Service.

SFWMD-5 Response: The Corps issued a request for bid to complete construction of the detention system between S-332B North and S-332D in March 2007 and anticipates awarding the construction contract in May 2007.

SFWMD-6 Response: The Corps is currently implementing the marsh operations identified during the IOP process which limits depths in the C-111 reservoirs to 2 feet. The FSEIS clearly states on page 21 that monitoring will continue as the operating criteria are adjusted and evaluated for system response as we move towards the proposed CSOP operational criteria. It is understood that criteria for marsh operations developed during CSOP occurred after IOP implementation.

SFWMD-7 Response: Page 18 of the FSEIS states that "under IOP, the S-356 would collect seepage (primarily from the west - WCA-3B and NESRS) along the reach of the L-31N canal that extends from structures S-335 to G-211, and the L-30 canal (WCA-3B and the Pennsuco Wetlands) by pumping water west into L-29 borrow canal and NESRS when conditions permit. The groundwater gradient in this area is predominantly from NESRS towards the east. " IOP did not use S-356 to pump seepage releases from S-335. S-335 seepage releases were passed on to the SDCS.

SFWMD-8 Response: Corps has not yet received such a list, but we will be glad to coordinate with FWS when received.

Florida Department of Agriculture and Consumer Services
CHARLES H. BRONSON, Commissioner
The Capitol • Tallahassee, FL 32399-0800
www.doacs.state.fl.us

Please Respond to: Office of Agricultural Water Policy
P.O. 24680
3301 Gun Club Road
West Palm Beach, FL 33416

January 17, 2007

Ms. Lauren Milligan, Coordinator
Florida State Clearinghouse
3900 Commonwealth Boulevard, MS-47
Tallahassee, Florida 32399-3000

SAI # FL200612182970C

Received JAN 19 2007

Dear Ms. Milligen:

The Florida Department of Agriculture and Consumer Services (FDACS) appreciates the opportunity to provide comments on the Corps' December 2006 Final Supplemental EIS for the Interim Operational Plan (IOP) for Protection of the Cape Sable Seaside Sparrow.

FDACS has previously submitted comments through the Florida State Clearinghouse on the February 2001 Draft KR EIS, the October 2001 Supplemental IOP EIS, the May 2002 Final EIS, and the June 2006 Draft Supplemental IOP EIS that have not been adequately addressed in this document. As stated in previous letters, the Department remains concerned about the type of flood protection analyses that have been done for this project.

In the section of the December 2006 final EIS describing IOP performance (pg 62), the Corps confirms that the canal levels resulting from implementation of IOP are consistent with those predicted in the modeling (pp 62-63). Model results also indicate that the ground water table in the study area would be higher in the wet season. A consistently higher groundwater table will harm tree roots and cause disease and/or death of the tropical fruit trees. Even though previous letters from the State Clearinghouse have stated that "the concerns identified by the reviewing agencies must be addressed prior to project implementation" in order for the project to be consistent, the Corps has not addressed the concerns expressed by the Department on four previous occasions nor in this document.

The Department restates the position that the additional flood storage capacity and structures that have been added could address the concerns with changes to the L-31N canal level operations. In order to reduce flooding impacts, and meet the ecological objectives, we support the implementation of Alternative 1. We continue to be strongly opposed to the adoption of Alternative 7R.**FDACS-1.**

Florida.

Florida Agriculture and Forest Products

If you have any questions or I can assist in any way, please feel free to call me at 561- 682-2845. We would be happy to participate in any future collaborative efforts to develop operational plans in this region.

Sincerely,

CHARLES H. BRONSON
COMMISSIONER of AGRICULTURE

Linda J. McCarthy
Water Policy Liaison

cc: Chuck Aller, FDACS
Tom MacVicar

Response FDACS-1: It was not possible to simultaneously meet the level of expectations that each stakeholder group has for the system. Alternative 7R provides for real-time monitoring to ensure that degradation to natural resources will be minimized and current flood control capability will not be reduced. There are several provisions to adjust operations and adapt management of the system on a case-by-case basis to achieve these objectives. One of the provisions is the pre-storm drawdown for named events and for other than named storm events should the SFWMD determines that there is a strong likelihood of flooding. Alternative 7R incorporates principles of flexible and sound water management actions within its structural limitations.

COUNTY:
MIAMI-
DADE

SCH-
CORPS
2006-
11533

DATE: 12/18/2006
COMMENTS DUE DATE: 1/19/2007
CLEARANCE DUE DATE: 2/2/2007
SAI#: FL200612182970C
REFER TO: FL200605152302C

MESSAGE:

STATE AGENCIES
AGRICULTURE
ENVIRONMENTAL PROTECTION
FISH and WILDLIFE COMMISSION
X STATE
TRANSPORTATION

WATER MNGMNT. DISTRICTS
SOUTH FLORIDA WMD

OPB POLICY UNIT

RPCS & LOC GOVS

RECEIVED

JAN 23, 2007

OIP / OLGA

The attached document requires a Coastal Zone Management Act/Florida Coastal Management Program consistency evaluation and is categorized as one of the following:

- Federal Assistance to State or Local Government *(15* CFR 930, Subpart F). Agencies are required to evaluate the consistency of the activity.

X Direct Federal Activity (15 CFR 930, Subpart C). Federal Agencies are required to furnish a consistency determination for *the States* concurrence or objection.

- Outer Continental Shelf Exploration, Development or Production Activities (15 CFR 930, Subpart F). Operators are required to provide a consistency certification for state concurrence/objection.

- Federal Licensing or Permitting Activity (IS CFR 930, Subpart D). Such projects will only be evaluated for consistency when there is not an analogous state license or permit.

Project Description:

DEPARTMENT OF THE ARMY, JACKSONVILLE DISTRICT CORPS OF ENGINEERS - FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (SEIS) ON THE INTERIM OPERATIONAL PLAN (IOP) FOR PROTECTION OF THE CAPE SABLE SEASIDE SPARROW, EVERGLADES NATIONAL PARK - MIAMI-DADE COUNTY, FLORIDA.

From:
Division/Bureau:

To: Florida State Clearinghouse
AGENCY CONTACT AND COORDINATOR (SCH)
3900 COMMONWEALTH BOULEVARD MS-47 TALLAHASSEE, FLORIDA 32399-3000 TELEPHONE: (850) 245-2161
FAX: (850) 245-2190

EO. 12372/NEPA Federal Consistency

X No Comment X No Comment/Consistency

Division of Historical Resources Bureau of Historic Preservation

Reviewer:
Date:

Laura A. Kammerer, Deputy SHPO
1/22/2007

Moulding, Jon SAJ

From: Markley, Susan M. (DERM) imarkis@miamidade.gov)
Sent: Friday, February 02, 2007 4:58 PM
To: Comments. IOP SAJ
Cc: Idarraga, Rene (DERM); Levinson, Marcia (DERM)
Subject: Final SEIS re IOP

Attachments: IOP COMMENTS1.doc

The staff of the Water Management Division of the Miami-Dade Department of Environmental Resources Management has reviewed the Final SEIS Interim Operational Plan (IOP) for Protection of the Cape Sable Seaside Sparrow, and offer the comments contained in the attached Word document. If you have additional questions, please contact Mr. Rene Idarraga or Ms. Marcia Steelman (Levinson) at 305 372-6950.

Thank you for the opportunity to comment.

Susan M. Markley, Ph.D

Ecosystem Restoration & Planning Division Chief

Miami-Dade Department of Environmental Resources Management 33 SW 2nd Avenue

Miami, FL 33130

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www.miamidade.gov

Miami-Dade County:"Delivering Excellence Every Day" «IOP

COMMENTS1.doc»

Miami-Dade Department of Environmental Resources Management
Water Management Division
1OP COMMENTS

1. Staff reviewed the document and model results for all different alternatives and concurs with the statement that there are limitations to the predictive capabilities of the model used (SFWMM or 2X2, version 3.8).

2. Staff does not agree with the statement page vii of the Executive Summary that there are no flooding impacts to residential and agricultural lands above previous levels.**MD-DERM-1**

Response MD-DERM-1: Analyses performed in the IOP process indicated flooding risk has not increased. IOP Alt7R not only included a provision for pre-storm drawdowns for "other than named storm events" in an attempt to address concerns, but also the C-111 reservoirs were added. These provisions provide operational flexibility by allowing faster implementation during flood fighting mode and by storing the water in the reservoirs. Analysis included in the FSEIS showed that operations under IOP have not increased flooding.

3. Surface water monitoring results for Alternative 7R, which was implemented in June 2002, does not show evidence of increased frequency of high canal stages in Miami-Dade County in the southern basins during regular operations, specifically on the C-1, C-102 and C-103, and along L-31N, in the reach between G-211 and S-331. These observations are consistent with the results of the model (See Page 62).

4. However, increased discharges from regional system to C-1, C-102 and C-103 during storm events aggravated flood conditions after the implementation of IOP. These concerns were first voiced in the letter dated November 21, 2001 to Colonel James G. May (attached).**MD-DERM-2.**

Response MD-DERM-2: Disagree with the statement claiming IOP aggravated flooding. In general, surface and groundwater levels experienced in the entire SDCS during Hurricane Irene in Oct 1999, "No name" storm in Oct 2000 and Hurricane Katrina in Aug 2005 were similar and occurred under three different operational criteria Test 7, ISOP and IOP, respectively. Under IOP, pre-storm drawdowns are implemented by the SFWMD on SDCS structures. In general, during this mode of operation water releases from the regional system (i.e SDCS) are made as necessary to allow canal levels reach the respective pre-determined lower target elevation in preparation for the event. The intent is to build up storage capacity in canal system to help mitigate flooding.

5. IOP increased GW stages along L-31N between G-211 and S-331, as indicated by

monitoring results during hurricane Katrina (attached). The 2X2 model used in this study cannot show the results of these operational modifications of the canal levels during storm events.**MD-DERM-3.**

Response MD-DERM-3: It is clear that observed stages may vary from modeled stages. In general, surface and groundwater levels experienced in the entire SDCS during Hurricane Irene in Oct 1999, "No name" storm in Oct 2000 and Hurricane Katrina in Aug 2005 were similar and occurred under three different operational criteria Test 7, ISOP and IOP, respectively. Under IOP, pre-storm drawdowns are implemented by the SFWMD on SDCS structures. In general, during this mode of operation water releases from the regional system (i.e SDCS) are made as necessary to allow canal levels reach the respective pre-determined lower target elevation in preparation for the event. The intent is to build up storage capacity in canal system to help mitigate flooding.

6. As part of the continuous adaptive management strategies integrated in the CSOP, we would like to request the implementation of additional trigger levels for the pre-storm operations to take into consideration the groundwater levels on the southern Miami-Dade basins and prevent the aggravation of flood conditions in the urban and agricultural areas.MD-DERM-4.

Response MD-DERM-4: The proper forum for this specific request is the CSOP PDT. It is the responsibility of the CSOP PDT to develop and incorporate the initial operational criteria based on the TSP. Subsequent refinements to the operational criteria may be necessary in the future as CSOP is implemented.

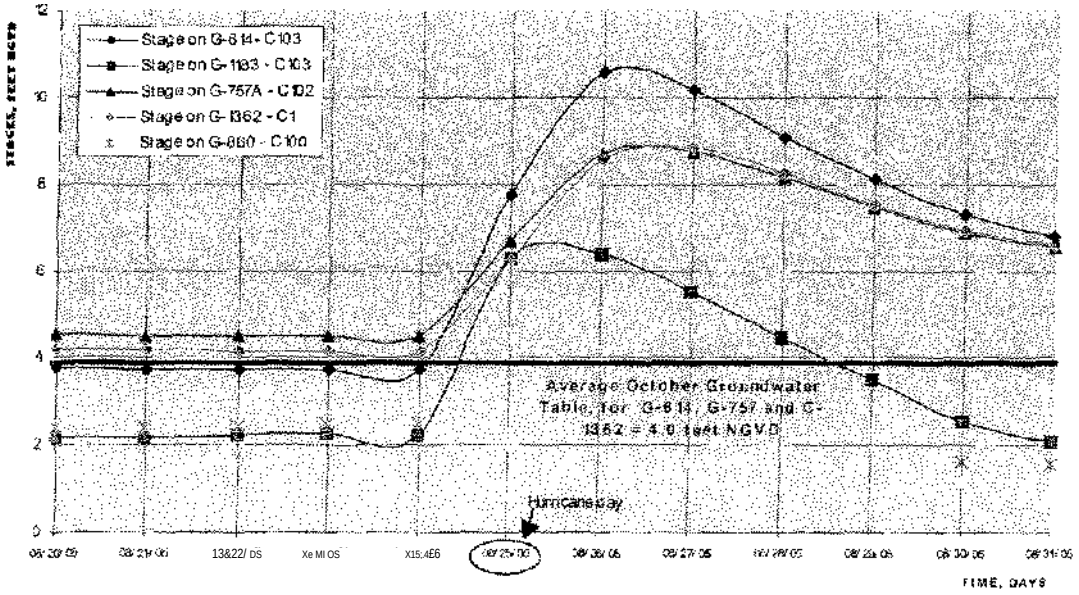
Analysis of Groundwater Levels during Hurricane Katrina

In order to lower groundwater levels and improve drainage in South Florida, particularly Miami-Dade County, the SFWMD adjusted the operation of the water control structures to lower all canals to pre-storm operation levels, on August 23, 2005. This would have created additional capacity to accommodate the large amounts of stormwater runoff expected for Katrina.

However, prior to the arrival of Katrina, the groundwater levels were already very high, particularly for the C-1, C-100, C-102 and C-103 Basins, close to typical values for the end of wet season (Average October Water Table), which indicate the design limit for the drainage systems in Miami-Dade County. Even though the pre-storm operations were initiated, the SFWMD could not achieve the desired groundwater levels with only 24 hours of warning time and the current canal capacity.

With the arrival of the storm, groundwater levels throughout the South-Dade conveyance system increased to flood levels, remaining high for several days (see graphics below), even though all canal discharge structures had been kept fully open to provide flood relief.

HURRICANE KATRINA - GROUNDWATER LEVELS
From August 20 to August 31, 2005



TO: Army Corps Eng -
P.O. Box 4970
Jacksonville FL 32232-0019
Attn Planning Division

Stan Carlin
P.O. BOX 517
MELBOURNE, FL 32902-0517
321-729-8387 • 305-559-4136

RE: FINAL SUPPLEMENTAL DECEMBER 2006
INTERIM OPERATIONAL PLAN
SEASIDE SPARROW -

DATE: 1/24/07

Attn STUART APPLEBAUM

Please send copy of IOP

To Myself STAN CARLIN
P.O. BOX 517
MELBOURNE FL 32902

to JON WIESENBERG
GATOR PARK
P.O. Box 940787
Miami FL 33194-0787

To WILEY HICKS
890 So DIXIE Hwy
CORAL GABLES FL 33146

Thank you
Stan Carlin

also when completed send RECORD of DECISION
FINAL SEIS

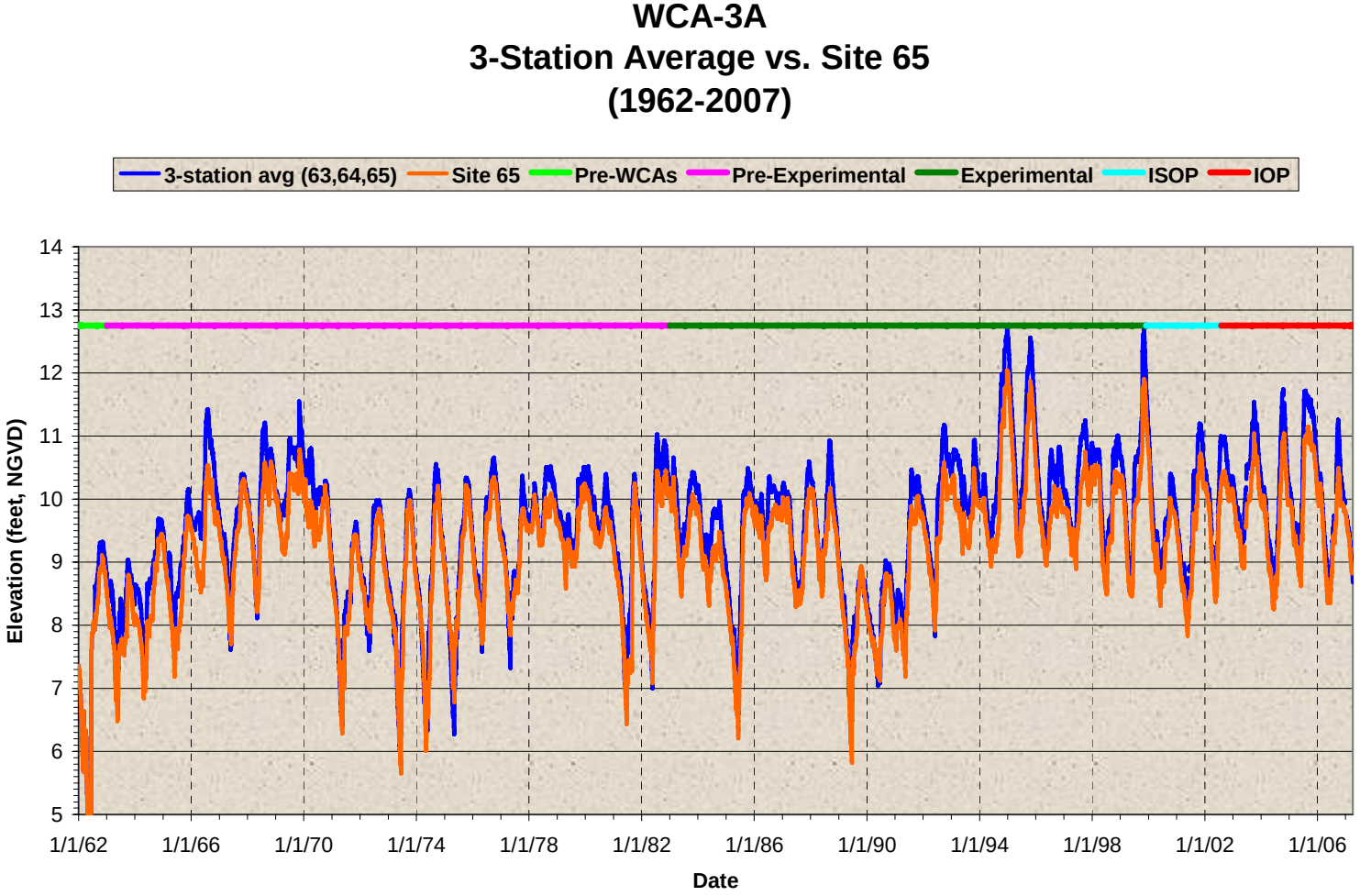


Figure 1. WCA-3A Stages at Site 65 and the 3-Station Average

Page Break

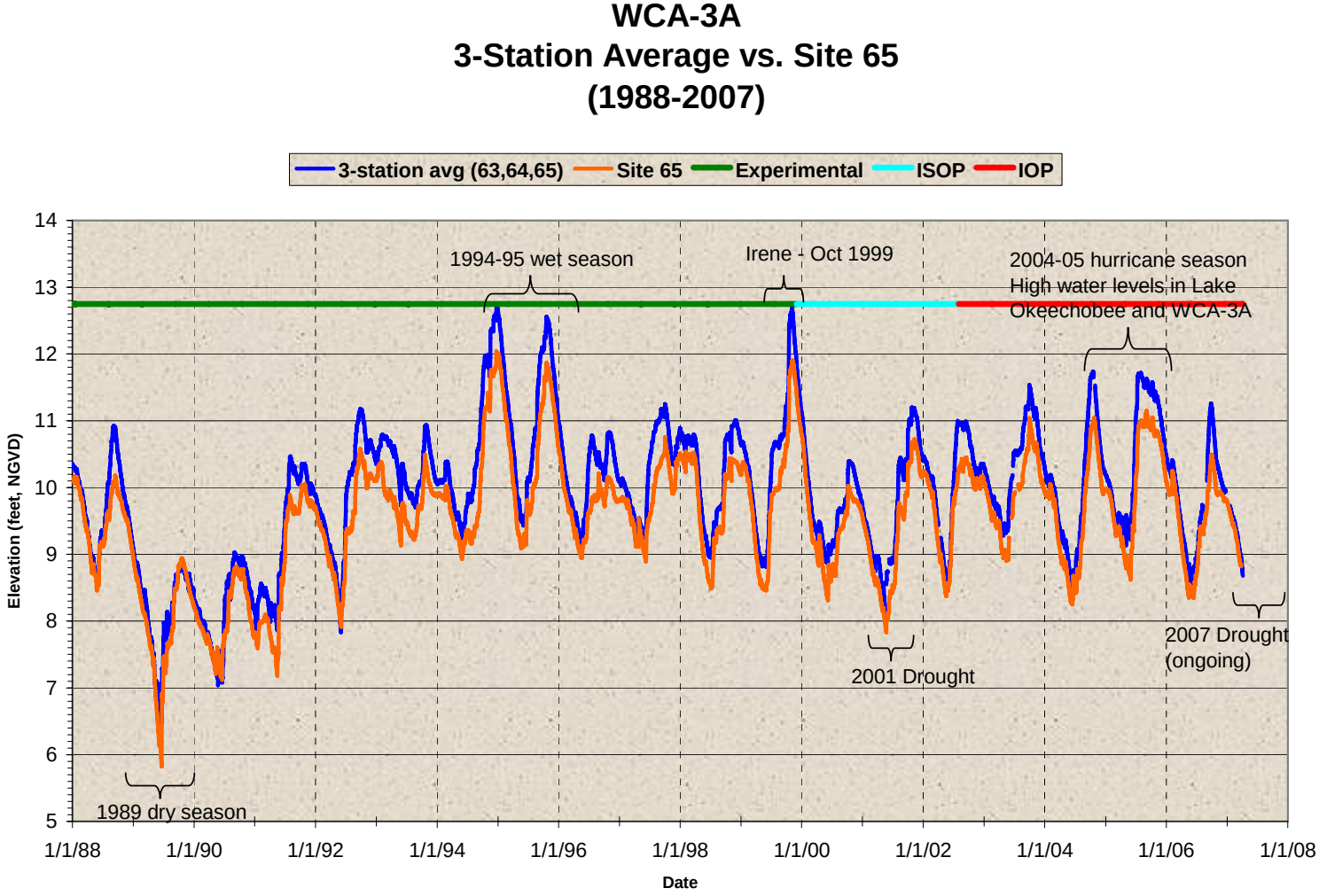


Figure 2. WCA-3A Stages at Site 65 and the 3-Station Average with Notations

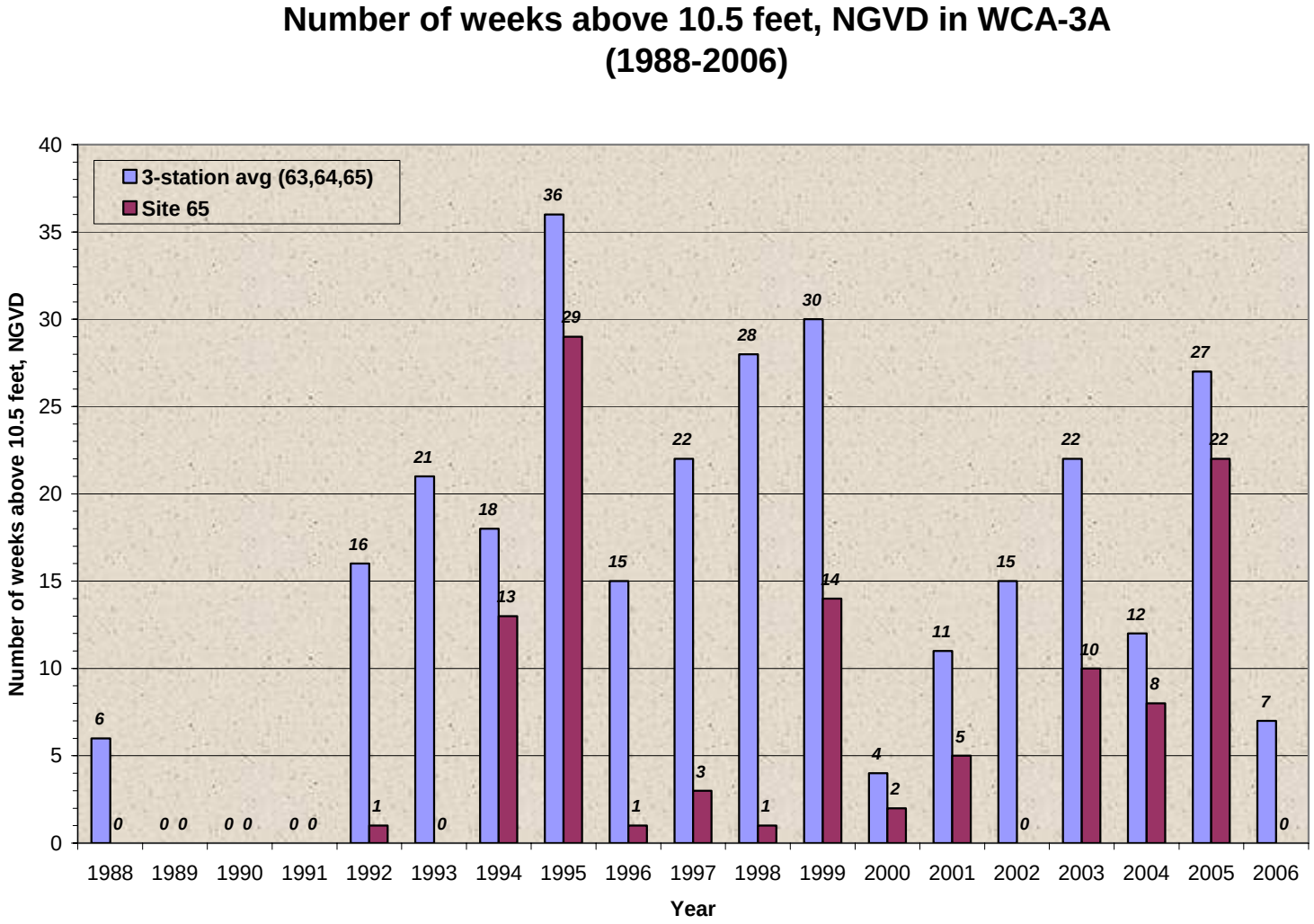


Figure 3. Number of Weeks above 10.5 feet NGVD in WCA-3A at Site 65 and 3-Station Average.

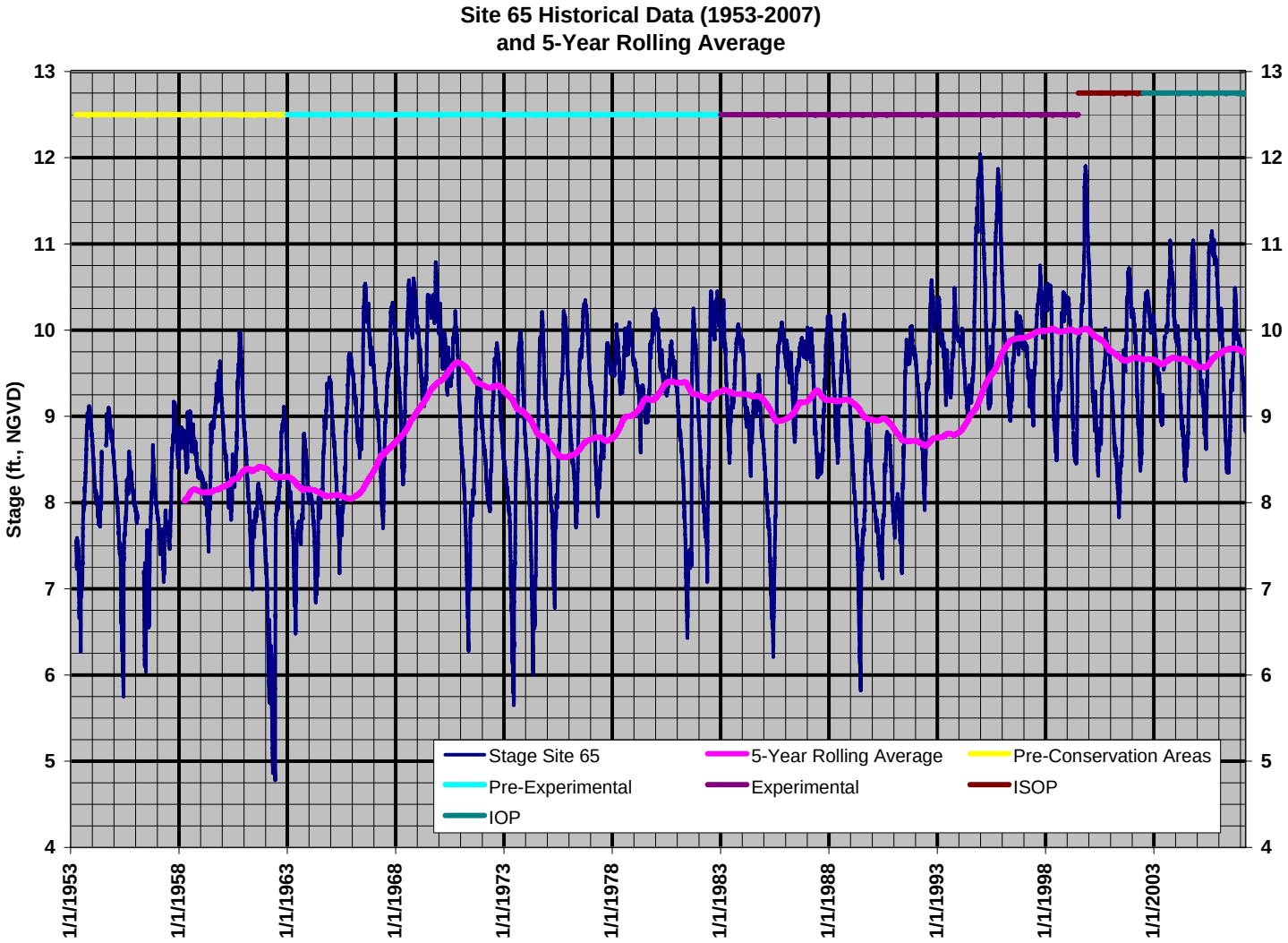


Figure 4 Site 65 Historical Data and 5-Year Rolling Average

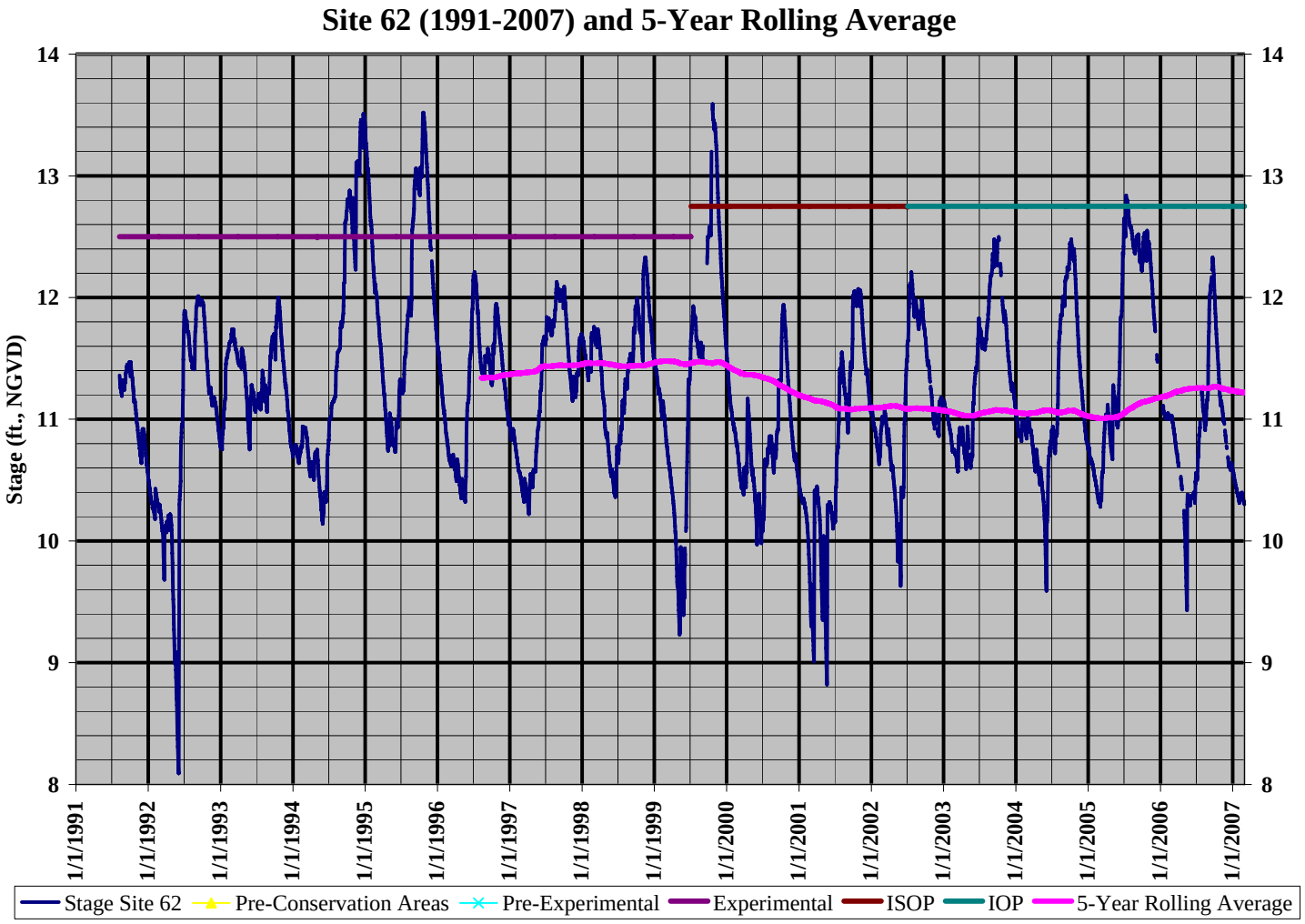


Figure 5 Site 62 Historical Data and 5-Year Rolling Average

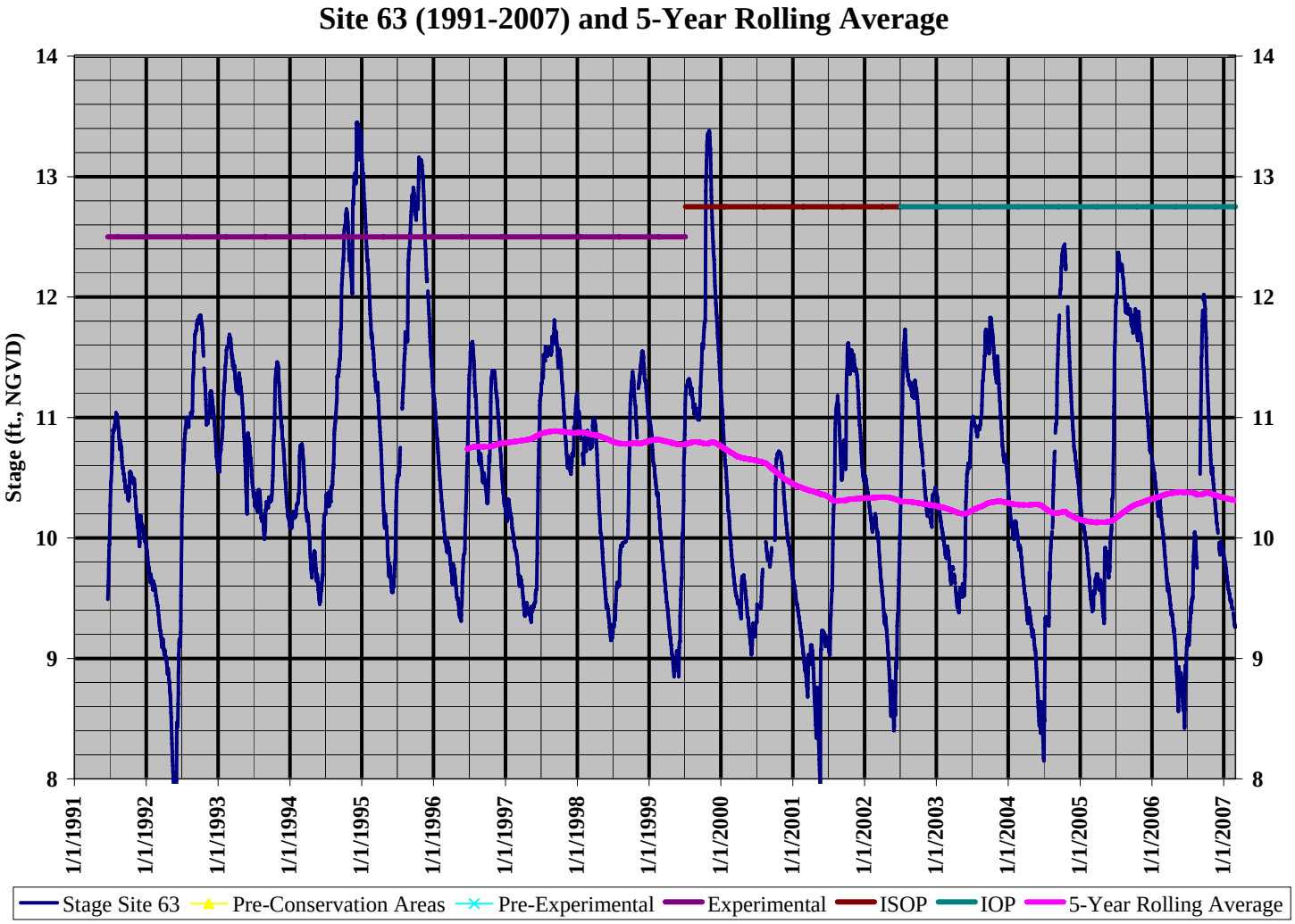


Figure 6 Site 63 Historical Data and 5-Year Rolling Average

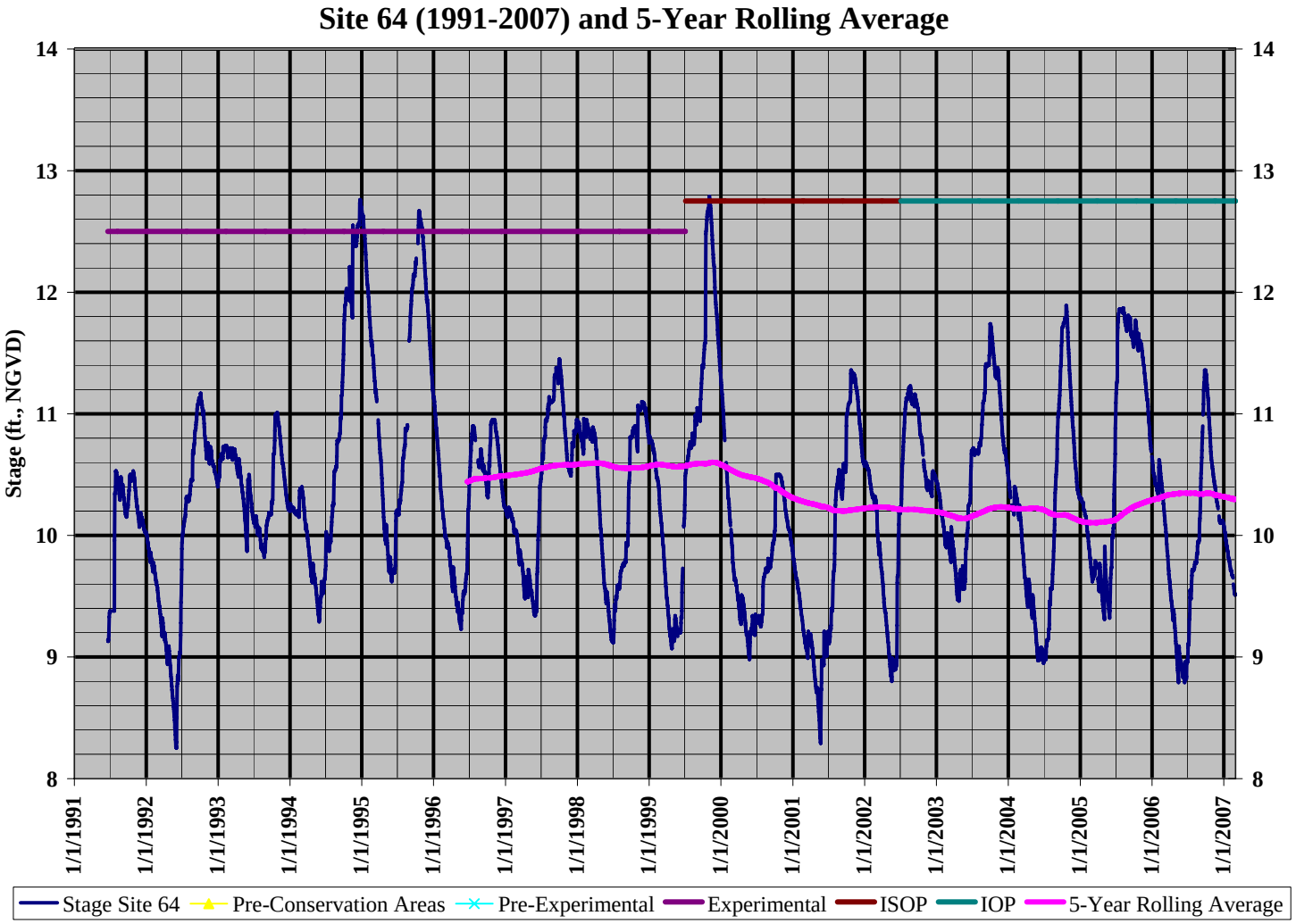


Figure 7 Site 64 Historical Data and 5-Year Rolling Average